No. 87-897

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

J.E. BERNARD & CO.,

Petitioner,

v.

THE INGERSOLL MILLING MACHINE COMPANY, M/V BODENA, her engines, boilers, etc., EXCELLENT MARINE, INC., TAIWAN INTERNATIONAL LINE LIMITED and FIREMAN'S FUND INSURANCE CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December ___, 1987

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85 pp

QUESTIONS PRESENTED

1. Whether a dispute involving documentation services performed under an agency agreement and ancillary to a maritime contract falls outside the scope of admiralty jurisdiction pursuant to 28 U.S.C. § 1333.

2. Whether an ocean bill of lading containing the phrase "ON DECK SHIPPER'S RISK" is a clean bill of lading as a matter of law.

LIST OF PARTIES

The parties to the proceedings below were the petitioner J.E. Bernard & Company and the respondents M/V Bodena, her engines, boilers, etc., Excellent Marine, Inc., Taiwan International Line Limited, Fireman's Fund Insurance Co., and The Ingersoll Milling Machine Company. The parties before this Court are the same as those below.

RULE 28.1 LIST

Petitioner J.E. Bernard & Co., states, pursuant to Rule 28.1, that Roanoke Insurance Co. and Radix Group International are corporate parents of J.E. Bernard & Co.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
I. THE SECOND CIRCUIT'S ATTEMPT TO EXPAND ADMIRALTY JURISDICTION TO INCLUDE WITHIN ITS SCOPE GENERAL AGENCY CONTRACTS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS	5
II. THE DEFINITION OF "CLEAN BILL OF LADING" HAS AN ESTABLISHED MEANING IN INTERNATIONAL TRADE AND, IN THE INTERESTS OF UNIFORMITY, THIS COURT SHOULD DECIDE THIS IMPORTANT, UNDECIDED QUESTION OF FEDERAL LAW	9
CONCLUSION	11
APPENDIX	1a
Ingersoll Milling Machine Co. v. M/V Bodena, 829 F.2d 293 (2d Cir. 1987)	1a
Ingersoll Milling Machine Co. v. M/V Bodena, Slip op. (2d Cir. Oct. 23, 1987)	35a
Ingersoll Milling Machine Co. v. M/V Bodena, 619 F. Supp. 493 (S.D.N.Y. 1985)	38a

TABLE OF AUTHORITIES

Cases: *Page*

Aldinger v. Howard, 427 U.S. 1 (1976) 8

David Crystal, Inc. v. Cunard Steam-ship Co., 223 F. Supp. 273 (S.D.N.Y. 1963), *aff'd*, 339 F.2d 295 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965) 8

The Delaware, 81 U.S. (14 Wall.) 579 (1872) 9, 10

E.S. Binnings, Inc. v. M/V Saudi Riyadh, 815 F.2d 660 (11th Cir. 1987) 6, 8

Hadjipateras v. Pacifica, S.A., 290 F.2d 697 (5th Cir. 1961) 7, 8

Hinkins Steamship Agency, Inc. v. Freighters, Inc., 498 F.2d 411 (9th Cir. 1974) 4, 7, 8

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F. 2d 800 (2d Cir. 1971) 8

Minturn v. Maynard, 58 U.S. (17 How.) 477 (1855) 5, 6, 7, 8

Peralta Shipping Corporation v. Smith & Johnson (Shipping) Corporation, 470 U.S. 1031, 105 S. Ct. 1405 (1985) (Blackmun, J., dissenting) 6, 7

Peralta Shipping Corporation v. Smith & Johnson (Shipping) Corporation, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985) 6, 7, 8

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) . . . 8

Page

STATUTES:

28 U.S.C. § 1332(c) 8

28 U.S.C. § 1333 . . . . . 2, 3

MISCELLANEOUS:

G. Gilmore & C. Black, *The Law of Admiralty* 29 (2d ed. 1975) 5

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner J.E. Bernard & Co. respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on September 14, 1987, and October 23, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 829 F.2d 293, and is reprinted in the appendix hereto, at 1a, *infra*.

The memorandum decision of the United States District Court for the Southern District of New York (Robert L. Carter, D.J.) is reported at 619 F. Supp. 493, and is reprinted in the appendix hereto at 38a, *infra*.

JURISDICTION

Improperly invoking federal jurisdiction under 28 U.S.C. § 1333, the respondent brought this suit in the Southern District of New York. On September 4, 1985, the district court rejected the petitioner's challenge to jurisdiction under 28 U.S.C. § 1333. See appendix at 53a, *infra*.

On petitioner's appeal, the Second Circuit entered a judgment and an opinion affirming the district court's order on September 14, 1987, finding that jurisdiction pursuant to 28 U.S.C. § 1333 was properly invoked. See appendix at 13a, *infra*. On October 23, 1987, the Second Circuit denied a petition for rehearing.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1333. Admiralty, Maritime and prize cases.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or Maritime jurisdiction, saving to suitors in all cases other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

STATEMENT OF THE CASE

Respondent Ingersoll Milling Machine Company ("Ingersoll") manufactures heavy equipment in Rockford, Illinois. Respondent's sister corporation, Waldrich Siegen,

GmbH, contracted to sell several orders of specially designed machinery to Hyundai International and engaged respondent as a subcontractor to manufacture one of the orders and arrange for its transportation to Korea. To this end, respondent contracted with Gryphon Shipping Services to secure a vessel to ship the cargo, and with petitioner J.E. Bernard & Company ("Bernard"), to obtain clean bills of lading and documentation for the voyage. Taiwan International Line Ltd. time chartered the vessel which was to carry respondent's cargo from New Orleans to Pusan, Korea.

In accordance with its contract, Bernard's documentation clerk prepared a master ditto form and shipper's export declaration at Bernard's office in Elk Grove Village, Illinois and forwarded these to Taiwan International's agent, Mid Gulf in New Orleans. Bernard also used the master ditto form to prepare an advance notice of shipment and forwarded this to Ingersoll. All services provided by Bernard were strictly "shoreside" in Illinois. Mid Gulf prepared the original bill of lading directly from the master ditto except for one deviation. Mid Gulf altered the master ditto by adding, in bold letters, the phrase, "ON DECK SHIPPER'S RISK." After the M/V Bodena sailed, the ship's master mailed the original bills of lading to Gryphon Shipping Services in the Chicago area.

In accordance with the final bill of lading, 17 of the 20 boxes comprising respondent's shipment were stored on the deck of the M/V Bodena. After suffering a stormy, month-long voyage to Pusan, the portion of the shipment stored on deck was significantly damaged. As a result, respondent commenced one action in the Southern District of New York and a second action in the Northern District of Illinois, grounding jurisdiction for both on 28 U.S.C. § 1333. The first action was againt the ship, its owner and the company that time chartered the ship from its owner. The second action was against petitioner and Fireman's

Fund Insurance Company, respondent's insurance carrier, and was subsequently transferred to the Southern District of New York, on Ingersoll's motion, pursuant to 42 U.S.C. § 1404(a). The two actions were consolidated in the district court for all purposes.

Bernard challenged admiralty jurisdiction in the district court, arguing that Bernard's documentation services were preliminary in nature and merely lead to the maritime contract and thus did not fall within the scope of admiralty jurisdiction. Relying on *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411 (9th Cir. 1974), however, the court rejected Bernard's challenge and found instead that the "preparation and processing of the bill of lading, the export declarations and payment of the ocean freight 'were clearly maritime and necessary' for the shipment by ocean voyage to Korea." *Ingersoll Milling Machine Co. v. M/V Bodena*, 619 F. Supp. 493, 503 (S.D.N.Y. 1985). Bernard appealed.

The Second Circuit similarly rejected Bernard's jurisdictional challenge, holding that "Bernard's freight forwarding contract with Ingersoll involved enough tasks of a nonpreliminary nature to support admiralty jurisdiction." *Ingersoll Milling Machine Co. v. M/V Bodena*, 829 F. 2d at 301 (2d Cir. 1987). The court, relying on *Hinkins*, looked to the nature of the services performed by Bernard and found that the preparation and processing of export declarations, delivery orders, dock receipts, bills of lading and advance notice of shipment were essential to the voyage. The court concluded that these services related to the ship in its use as such, and therefore the contract could fairly be said to constitute a maritime contract. *Id.* at 302-03.

In determining whether Bernard had breached its contract to provide Ingersoll with a clean bill of lading, the Second Circuit refused to consider evidence of the parties' or international usage of the term "clean bill of lading." Instead, the court concluded that a bill of lading is unclean,

as a matter of law, if it bears the notation "ON DECK SHIPPER'S RISK." The court therefore held Bernard liable for the damage to Ingersoll's cargo.

Bernard petitioned the Second Circuit for reconsideration, with a request for rehearing *en banc*, arguing that the court's decision conflicted with both Supreme Court and Second Circuit precedent. The court denied the petition without comment.

REASONS FOR GRANTING THE WRIT

I.

The Second Circuit's Attempt To Expand Admiralty Jurisdiction To Include Within Its Scope General Agency Contracts Conflicts With Decisions Of This Court And Other Circuits.

The Second Circuit has held that a contract to perform documentation services prior to a shipment by sea, services of the type traditionally held not to give rise to a maritime contract, here fall within the scope of admiralty jurisdiction. This expansion of admiralty jurisdiction risks "that the actual concerns of the shipping industry may [be held to] reach as far as the last ranch that sends cattle to port . . . . " G. Gilmore & C. Black, *The Law of Admiralty* 29 (2d ed. 1975). The Second Circuit's improper expansion of admiralty jurisdiction warrants this Court's attention.

The Second Circuit's decision conflicts with the long-standing rule that general agency contracts are not cognizable in admiralty. *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855). Under this long-established rule, contracts to perform services which are preliminary and end when the cargo is delivered to the pier are outside the scope of admiralty jurisdiction. The Second Circuit was aware of this Court's consistent "refus[a1] to extend admiralty jurisdiction to disputes involving general agency contracts . . . that is, arranging for the performance of the various services that are preliminary to maritime move-

ment." *Peralta Shipping Corporation v. Smith & Johnson (Shipping) Corporation*, 470 U.S. 1031, 105 S. Ct. 1405 (1985) (Blackmun, J., dissenting). Nevertheless the Second Circuit avoided the rule by characterizing the performance of documentation services related to shipment to be essential to the voyage. The time is ripe for this Court to take the opportunity to reaffirm the continued validity of the *Minturn* rule proscribing admiralty jurisdiction over general agents.

Also in conflict with the Second Circuit's decision below is the Eleventh Circuit's recent decision in *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660 (11th Cir. 1987). The agency contract in *Binnings* required the appellee to, among other things: coordinate vessel husbanding services; collect documents and provide the necessary cargo-related documents for the cargo including bills of lading; solicit cargo; respond to requests regarding freight rates; handle the flow of funds; perform accounting and documentation services; and arrange tug services. Although the district court held that the contract fell within admiralty jurisdiction, the appellate court disagreed. The Eleventh Circuit held that, since all of these services were clearly "shoreside" and preliminary to the voyage, the case fell outside the admiralty jurisdiction under *Minturn*. *Id.* at 664.

The Second Circuit's decision below similarly conflicts with a previous decision from its own circuit, *Peralta Shipping Corporation v. Smith & Johnson (Shipping) Corporation*, 739 F.2d 798 (2d Cir. 1984). In *Peralta* a shipping corporation provided vessel husbanding services, such as: arranging for entrance and clearance at customs; executing all customs documents; arranging for fuel, water, provisions, emergency repairs, and port charges; and, arranging for tug service. The *Peralta* court "faithfully adhered" to the *Minturn* rule by refusing to include

this husbanding general agency contract within the scope of admiralty jurisdiction. *Id.* at 802.

Decisions in two other circuits contribute to the confusion because the courts there carved out their own exceptions to the *Minturn* rule. The Ninth Circuit, in *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411 (9th Cir. 1974), affirmed the district court's holding, 351 F. Supp. 373 (W.D. Cal. 1972), that a husbanding agency contract fell within the scope of admiralty jurisdiction. The district court had distinguished *Hinkins* from others like it since there the contract required the plaintiff to procure and directly supervise husbanding activities. The Fifth Circuit, in *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697 (5th Cir. 1961), seemed to express the opinion that the *Minturn* rule excluding general agents from admiralty jurisdiction applies only to an action for an accounting. The court reasoned:

> It concerns a ship. It relates not only to a ship; its very purpose is to effectuate the physical, economic operation and employment of a vessel. And what is here in controversy are the fruits of such operation.

Id. at 703. The Supreme Court has referred to these two decisions as "questionable exceptions to the [*Minturn*] rule that have created confusion and disagreement." *Peralta*, 470 U.S. at 1033-34, 105 S. Ct. at 1407. (Blackmun, J., dissenting.) The Second Circuit's decision in this case adds to that confusion.

Unfortuntely, "predicat[ing] jurisdiction on such hair-splitting distinctions . . . blur[s], if not obliterate[s], a rather clear admiralty demarcation." *Peralta*, 739 F.2d at 804. The approach taken by the courts below subverts the policy behind admiralty jurisdiction, that maritime law be developed along uniform lines.[1]

---

[1] In the Second Circuit, Ingersoll unsuccessfully attempted to

(Footnote continued on the following page)

The Second Circuit, in *Peralta*, and the Eleventh Circuit, in *Binnings*, followed this Court's rule in *Minturn* and supported a uniform application of admiralty jurisdiction. The case at bar, the Ninth Circuit's decision in *Hinkins*, and the Fifth Circuit's decision in *Hadjipateras*, however, conflict with the prevailing precedent of *Minturn* and create an ambiguity of law which should be settled by this Court.

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1 *(Continued)*

invoke diversity and pendant jurisdiction. The district court lacked diversity jurisdiction under 28 U.S.C. § 1332(c). At the time the underlying action was filed, both Ingersolll and Bernard were incorporated under the laws of the state of Illinois. The parties were therefore not diverse. Moreover, the doctrine of pendant jurisdiction should not now be employed to bring Ingersoll's common law claim against Bernard within the district court's jurisdiction. Ingersoll has no federal claims against Bernard and the liability of the parties who are named in the federal claims did not turn upon the conduct of Bernard. *See Aldinger v. Howard*, 427 U.S. 1, 2-3 (1976); *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 811 (2d Cir. 1971). In addition, since the district court was never faced with the issue of pendant jurisdiction, it is unclear whether the court would have exercised such jurisdiction after considering judicial economy, convenience and the fairness to the litigants. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726. (1966). Should this Court now decide that the exercise of pendant jurisdiction would have been proper, this will effectively deny Bernard its right to a jury trial. *See David Crystal, Inc. v. Cunard Steam-ship Co.*, 223 F. Supp. 273, 292 (S.D.N.Y. 1963), *aff'd*, 339 F.2d 295 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965). Bernard detrimentally relied upon Rule 38(e) of the Federal Rules of Civil Procedure in assuming that, under admiralty jurisdiction, it would be fruitless to demand a jury. It therefore cannot be argued that Bernard waived its right to a jury trial pursuant to Fed. R. Civ. P. 38 (d), since under Fed. R. Civ. P. 38(b), Bernard's right to a jury trial never ripened due to Ingersoll's erroneous attempt to invoke admiralty jurisdiction. Had the issue of pendant jurisdiction been raised in the district court, Bernard would have exercised its right to demand a jury. *See Leather's Best*, 451 F.2d at 811 n.12.

II.

The Definition of "Clean Bill of Lading" Has an Established Meaning in International Trade and, in the Interests of Uniformity, This Court Should Decide This Important, Undecided Question of Federal Law.

The Second Circuit has held that an ocean bill of lading cannot be "clean" as a matter of law if it bears a notation that goods are to be transported "ON DECK SHIPPER'S RISK." The request for a "clean" bill of lading, the court held as a matter of law, "is an implied request for stowage below deck." 829 F.2d at 304, and the court therefore refused to consider the parties' reliance upon the International Chamber of Commerce definition of a clean bill of lading which the parties incorporated into their contract to secure a clean bill of lading. Evidence of the parties' usage must be considered in order to determine whether a contract to secure clean bills of lading has been satisfied.

This Court has never addressed the precise question of whether a bill of lading can only be considered clean if it bears no notation regarding stowage. In *The Delaware*, 81 U.S. (14 Wall.) 579, 602 (1872), the Supreme Court addressed the issue of whether a trial court had properly refused to admit evidence regarding the shipper's consent to stow cargo on deck. Although there this Court stated that a clean bill of lading without a notation as to stowage generally implies that goods will be stowed under deck, the Court did not go so far as to suggest that a bill of lading containing a phrase about stowage could never be defined as clean. The precise issue of the definition of "clean" in this context has never been resolved by this Court.

The Delaware holds that evidence of a contrary usage in a particular trade is admissible to rebut an implication that stowage is to be below deck. *Id.* at 605. Despite this instruction, the Second Circuit refused to consider evidence of the parties' and the trade's contrary meaning in the underlying suit. Bernard presented evidence that a

clean bill of lading is defined by the International Chamber of Commerce, in Article 18 of its Uniform Customs and Practices for Documentary Credits, as "one which bears no superimposed clause or notation that expressly declares a defective condition of the goods and or the packaging." Consequently, the notation "ON DECK SHIPPER'S RISK" only affects a bill of lading's negotiability, not its status as "clean."

The International Chamber of Commerce has also formulated "Incoterms" to provide the shipping industry with a set of rules of define the chief terms used in foreign trade contracts. These Incoterms were incorporated into the contract in this case and defined a clean bill of lading as "one which bears no superimposed clauses expressly declaring a defective condition of the goods or packaging." In addition, the Incoterms specified that:

> The following clauses do not convert a clean to an unclean bill of lading:
>
> (a) clauses which do not expressly state that the goods or packaging are unsatisfactory, e.g., "second-hand cases," "used drums," etc.;
>
> (b) clauses which emphasize the carrier's nonliability for risks arising through the nature of the goods or the packaging;
>
> (c) clauses which disclaim on the part of the carrier knowledge of contents, weight, measurement, quality, or technical specification of the goods.

Nothing in this, or any other definition employed by the Interational Chamber of Commerce, prohibits a notation on a clean bill of lading that cargo will be stowed on deck at the shipper's risk. The Second Circuit's refusal to consider evidence of the parties' and the trade's customary use of this term, in violation of *The Delaware*, deserves this Court's attention.

CONCLUSION

For the reasons discussed above, this petition for certiorari should be granted. This dispute, which centers around an agreement to perform documentation services prior to a voyage by sea, does not fall within admiralty jurisdiction. Should this Court agree, this matter should be remanded to the District Court and dismissed for lack of jurisdiction. Should this Court determine that Ingersoll's claim against Bernard fell within the scope of admiralty jurisdiction, Bernard urges this Court to reverse the Second Circuit's holding that a bill of lading with a notation regarding stowage is unclean as a matter of law. This issue should be remanded to the District Court for its consideration of Bernard's evidence of contrary custom.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
Second Circuit

The INGERSOLL MILLING MACHINE CO., Plaintiff-Appellee in 85-7941, 85-7945, and 86-7405, Plaintiff-Appellant in 86-7413, Plaintiff-Cross-Appellant in 86-7413 re: 85-7941, 85-7945, and 86-7405.

v.

M/V BODENA, her engines, boilers, etc., Excellent Marine, Inc., Taiwan International Line Limited, J.E. Bernard & Co., and Fireman's Fund Insurance Co., Defendants,

Excellent Marine Inc.
Defendant-Appellee in
86-7413

Taiwan International Line Limited, Defendant-Third Party Plaintiff-Appellee in 85-7941, Defendant-Appellant in 86-7405, Defendant-Cross-Appellant in 86-7405 re: 85-7941, Defendant-Cross-Appellee in 86-7413

J.E. Bernard & Co., Defendant-Third Party Defendant-Appellant in 85-7941, Defendant-Cross-Appellee, in 86-7405 and 86-7413,

Fireman's Fund Insurance Co., Defendant-Appellee in 85-7941 and 86-7405, Defendant-Appellant in 86-7945, Defendant-Cross-Appellee in 86-7413.

Nos. 219-221 and 311, Dockets 85-7941, 85-7945, 86-7405 and 86-7413.

Argued Oct. 6, 1986.
Decided Sept. 14, 1987.
829 F.2d 293

Before CARDAMONE and PIERCE, Circuit Judges, and BONSAL, Senior District Judge.*

PIERCE, Circuit Judge.

These appeals are from a final judgment filed in the United States District Court for the Southern District of New York on April 28, 1986, following a bench trial before Judge Robert L. Carter. The judgment (1) awarded plaintiff-appellee The Ingersoll Milling Machine Co. ("Ingersoll") damages and prejudgment interest against defendants-appellants Taiwan International Line Ltd. ("Taiwan"), J.E. Bernard & Co. ("Bernard"), and Fireman's Fund Insurance Co. ("Fireman's Fund" or the "Fund") jointly and severally, (2) awarded Ingersoll attorney's fees and litigation expenses against Fireman's Fund, (3) awarded Fireman's Fund a right of subrogation against Taiwan and Bernard, and (4) dismissed claims of Taiwan and Bernard against each other.

Ingersoll cross-appeals seeking to increase its award of damages and prejudgment interest.

Appellants each raise a number of issues on appeal. We consider them seriatim, and we affirm the determinations of the district court except with regard to the award of attorney's fees and litigation expenses.

BACKGROUND

This case arises from the shipment of certain cargo from the United States to South Korea. The cargo, which was insured, and consisted of 20 packages, 18 of which were stowed on the deck of the ship, was damaged in transit. Simply stated, we must determine whether the district court properly decided who is responsible for the damage and that the insurer improperly refused to cover the loss.

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* Honorable Dudley B. Bonsal, Senior District Judge, United States District Court for the Southern District of New York, sitting by designation.

We set forth the essential evidence in this section, as found by the district court, 619 F.Supp. 493 (S.D. N.Y.1985), with details to be provided later as necessary.

In January 1978, Waldrich Siegen, GmbH ("Waldrich") of West Germany contracted to sell heavy, special design machines to Hyundai International, Inc., in Korea. Waldrich engaged its affiliate, Ingersoll, a manufacturer of specially design machinery, as a subcontractor to manufacture Shop Order 24441 ("Order # 24441") and to arrange for its shipment to Korea. Order # 24441 consisted of a ram type, horizontal spindle, traveling column machinery center, and was valued in excess of $2 million.

In the summer of 1979, Ingersoll, located in Rockford, Illinois, contacted Gryphon Shipping Service, Inc. ("Gryphon"), a broker and steamship agent in Chicago, to arrange for shipment of Order # 24441 to Korea.[1] Gryphon, in turn, contacted Taiwan, which had time chartered the M/V Bodena from its owner Excellent Marine, Inc. ("Excellent Marine"). Gryphon arranged with Taiwan in August 1979 for the cargo to be shipped in September 1979 from New Orleans aboard the M/V Bodena. A contract of carriage arose between Ingersoll and Taiwan in August 1979 when Ingersoll accepted the terms arranged by Gryphon and informed Gryphon that the shipment of Order # 24441 would be in twenty boxes. The district court found that, at the time of booking, there was no evidence that Ingersoll had agreed to on deck stowage. Gryphon's commission was to be paid by Taiwan, and Gryphon was found by the district court to be Taiwan's agent.

In connection with the shipment, Ingersoll also retained Bernard, a freight forwarder doing business in Elk Grove Village, Illinois, to perform various freight for-

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[1] Gryphon is not a party to this action.

warding tasks. In addition to other duties to be performed by Bernard, Ingersoll, by letter dated September 10, 1979, requested that Bernard secure "three originals and four copies of *clean* on-board bills of lading" (emphasis added). In response to this letter, Bernard prepared two master ditto forms of the bill of lading and also the shipper's export declaration. One of the master ditto forms was sent to Mid-Gulf Shipping, Inc. ("Mid-Gulf"), Taiwan's agent in New Orleans, to be used in the preparation of the original bills of lading; the other was sent to Gryphon. In addition, the master ditto was used to prepare an advance notice of shipment which was sent by Bernard to Ingersoll on September 25, 1979. Neither the master ditto, nor the advance notice, contained any notation as to stowage. Ingersoll informed Bernard that all the information on the advance notice was correct except that the port of discharge should be changed.

The Ingersoll cargo, which had arrived in New Orleans from Illinois by truck and rail, was loaded on board the M/V Bodena on September 26 and 27, 1979. Of the twenty boxes which comprised Order # 24441, eighteen were initially stowed on deck and two were stowed below deck. Mid-Gulf, Taiwan's agent, was responsible for the issuance of bills of lading. Prior to sailing, Mid-Gulf took the ditto form supplied by Bernard and added the phrase "on deck shipper's risk" to its face. Mid-Gulf then used the altered ditto to run off three original bills of lading and mailed the originals with thirteen copies to Gryphon in Chicago.

Ingersoll received the originals and four copies on October 1, 1979. Fred Woywod, Ingersoll's contract administrator, saw the documents that day but either did not notice the addition of the works "on deck shipper's risk" or if he did notice them, did not understand their legal significance. Bernard, too, received copies of the bills of lading on October 1 but failed to examine the issued bills to determine whether they were in fact clean, and, consequently,

failed to inform Ingersoll that Taiwan had not followed the instructions to issue clean bills of lading.

The M/V Bodena, which had made several intermediate stops at various East Coast ports, set sail from Savannah, Georgia, for Korea on October 14, 1979. At the time of sailing, seventeen of Ingersoll's boxes were stowed on deck, one of the boxes initially stowed on deck having been moved below deck. The voyage to Korea lasted more than one month and was beset with storms, heavy seas, and high winds. As a result of heavy rolling and pitching during the voyage, the seventeen boxes on the deck were severely damaged. Some boxes were broken; others were thoroughly soaked by sea water. Because of the damage, Order # 24441 had to be sent from Korea to Waldrich in Germany for repair. None of the three boxes stowed under deck was damaged.

Ingersoll maintained an all risk insurance policy with Fireman's Fund. That policy had been issued as an open cargo policy, designed to cover all of Ingersoll's shipments. In other words, a particular shipment would become covered under the policy either when Ingersoll filled out and sent to Fireman's Fund a certificate of insurance for each shipment, indicating the contents, value, destination, and carrier of the cargo, or when Ingersoll sent to the Fund a monthly declaration of shipments. As testified to by Fireman's Fund officials, such a policy was designed to provide automatic coverage such that even if the certificate or monthly declaration was sent after a loss had occurred, the shipment would nevertheless be covered.

The particular policy in question contained separate clauses for insuring under deck shipments and on deck

shipments.[2] Clause 17(a) insured under deck shipments

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[2] The pertinent provisions of the policy are set forth below in full:

> 17. (a) UNDER DECK shipments–Including containerized shipments under optional On Deck & /Or Under Deck bill(s) of lading are insured. Warranted free from Particular Average unless the vessel or craft be stranded, sunk, or burnt, but notwithstanding this warranty this Company is to pay any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at port of distress. *The foregoing warranty, however, shall not apply where broader terms of Average are provided for hereinafter.*
>
> BROADER TERMS: –
> Insured against all risks of physical loss or damage from any external cause irrespective of percentage, including theft, pilferage and/or non-delivery, but excluding nevertheless, the risks of war. strikes, riots seizure, detainment, confiscation requisition, nationalization and other risks excluded by the "F.C. & S. and/or S.R. & C.C." warranties in the printed portion of the policy except to the extent that such risks may be specifically covered by endorsement, also warranted free from any claims arising out of the inherent vice of the goods insured or consequent upon loss of time and/or market.
>
> (b) ON DECK shipments are insured: –
> Warranted free of particular average unless caused by the vessel and/or interest insured being strained, suck, burnt, on fire or in collision with another ship or vessel or with ice or with any substance other than water, but liable for jettison and/or washing overboard, irrespective of percentage. *The foregoing warranty, however, shall not apply when broader terms of Average are provided for hereinafter*
>
> BROADER TERMS: – [None provided]

(Footnote continued on the following page)

and specifically contained broader terms of coverage. Those terms provided coverage against all risks of physical loss or damage. Clause 17(b), which did not contain broader terms, provided coverage for on deck shipments known as free of particular average ("FPA"). FPA coverage does not cover a partial loss of the subject matter insured unless certain contingencies not relevant herein occur. Another provision of the policy, clause 8(B)(2), limited coverage to $175,000 for shipments subject to an on deck bill of lading or shipments stowed on deck with the consent of the insured.[3]

In August 1979, Ingersoll sent to Fireman's Fund a certificate of insurance to cover Order # 24441. The certificate, which took effect before the boxes were actually loaded aboard the M/V Bodena, stated that the machinery was laden under deck. When Ingersoll learned of the damage to the cargo in December 1979, it notified Fireman's Fund of its loss. After an investigation, Fireman's Fund, on May 23, 1980, denied Ingersoll's claim under its policy for full indemnity for the repairs undertaken by Ingersoll.

The district court found that Taiwan and Bernard were jointly and severally liable for Ingersoll's damages, and accordingly, awarded Ingersoll $977,899 plus prejudgment interest. Fireman's Fund too was found jointly and

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2 *(Continued)*
Fireman's Fund Insurance Company, Marine Open Cargo Policy No. WB 20737, (italics in original), *also quoted in* 619 F.Supp. 493, 498-99 (S.D.N.Y.1985).

[3] Clause 8(B)(2) reads in full as follows:

> B. Of the limit of liability expressed above, this Company shall not be liable for more than
>
> . . . .
>
> (2) *$175,000.00* in respect of cargo shipped subject to On Deck ocean bill(s) of lading or stowed On Deck with consent of the Assured.

severally liable to Ingersoll in the same amount under the insurance policy; and it was ordered that to the extent that Fireman's Fund makes payment to Ingersoll for damages assessed, it will be entitled to recover such payment from Taiwan and Bernard, including taxable costs but not including attorney's fees and litigation expenses. Additionally, the district judge ruled that Ingersoll was entitled to recover attorney's fees and litigation expenses from Fireman's Fund. Finally, the district court dismissed the claims of Taiwan and Bernard against each other, as well as Ingersoll's claim against Excellent Marine. This appeal followed.

DISCUSSION

I.
TAIWAN

Ingersoll's claim against Taiwan can be characterized simply as a claim for breach of contract. There is no dispute that a contract of carriage existed between Ingersoll and Taiwan. Telephone conversations in August 1979 between representatives of Ingersoll, Gryphon, and Taiwan, in which the cargo was booked, led to a binding contract when Ingersoll informed Gryphon that it accepted Taiwan's terms. As the district court found, this contract constituted the contract of carriage. The open question then was what were the terms of the contract. More specifically, did the contract call for on deck or below deck stowage.

Absent an express agreement by the shipper permitting cargo to be stowed on deck or a general port custom permitting on deck stowage, a shipper is entitled to expect below deck stowage under a clean bill of lading. *St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial Do Rio de Janeiro*, 263 U.S. 119, 123-24, 44 S.Ct. 30, 30-31, 68 L.Ed. 201 (1923); *English Elec. Value Co. v. M/V Hoegh Mallard*, 814 F.2d 84, 89 (2d Cir. 1987); *Encyclopae-*

dia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7, 14 & n. 5 (2d Cir.1969), *cert.denied*, 397 U.S. 964, 90 S.Ct. 998, 25 L.Ed.2d 255 (1970); *accord Calmaquip Eng'g West Hemisphere Corp. v. West Coast Carriers Ltd.*, 650 F.2d 633, 639 (5th Cir. Unit B 1981); *see* 2A E. Benedict, *Benedict on Admiralty* § 123, at 12-11 (7th ed. 1987) ("[g]oods stowed on deck without the shipper's consent are at the ship's risk, the shipowner being liable for any loss or damage thereto.") To reiterate, a shipper's reasonable expectation on booking cargo for shipment is that it will be stowed below deck, unless the shipper agrees to the contrary or a general port custom permits above deck stowage. The burden is on the carrier to prove that the shipper consented to something other than the usual and customary arrangement. *See Gemini Navigation, Inc. v. Philipp Bros. Div. of Minerals & Chemicals Philipp Corp.*, 499 F.2d 745, 751 (2d Cir.1974).

Although the district court found that "[t]here is no evidence that Ingersoll specified below deck stowage," 619 F.Supp. at 500, it also found that "there is no credible evidence that Ingersoll agreed to an on deck shipment," *id.* Thus, the terms of the contract of carriage were established by the industry custom that stowage would be below deck. The district court correctly found that Taiwan had failed to meet its burden of proof that Ingersoll agreed to on deck stowage and that Taiwan was liable for not performing its contract obligations.

Taiwan presents a number of arguments in support of its contention that it is not liable for breach of contract.[4] First, Taiwan argues that Ingersoll waived its

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[4] Taiwan's argument that the district court improperly interpreted the meaning of "clean" on board bills of lading is not relevant. The contract of carriage between Ingersoll and Taiwan was formed in August 1979 when the cargo was booked. It did not contain any reference to bills of lading. Interpretation of the

(Footnote continued on the following page)

right to below deck stowage of its cargo. Specifically, Taiwan claims that by receiving the bill of lading on October 1, 1979 with the notation "on deck shipper's risk," Ingersoll had constructive notice that its goods had been stowed on deck. Therefore, Taiwan argues, Ingersoll had a duty to notify Taiwan that on deck stowage was unacceptable so that Taiwan could have either shifted the cargo to a below deck location or unloaded the cargo at another port of call at which the M/V Bodena docked prior to embanking for Korea on October 14, 1979.

The district court did indeed find that Ingersoll had constructive notice that its goods were being carried on the deck of the M/V Bodena at Ingersoll's risk. 619 F.Supp. at 501. However, a party asserting a waiver defense bears the burden of proof in establishing that defense. Taiwan, in our view, cannot make out a defense of waiver. Waiver is generally defined as an intentional relinquishment of a known right. *Shearson Hayden Stone, Inc. v. Leach,* 583 F.2d 367, 370 (7th Cir. 1978); *Fustok v. Conticommodity Services, Inc.*, 577 F.Supp. 852, 859 (S.D.N.Y.1984) *See generally 5 S. Williston, A Treatise on the Law of Contracts* § 678 (3d ed. 1961). An intent to waive a contractual right must be manifest in a party's failure to object. *See Saverslak v. Davis-Cleaver Produce Co.*, 606 F.2d 208, 213 (7th Cir.1979), *cert.denied*, 444 U.S. 1078, 100 S.Ct. 1029, 62 L.Ed.2d 762 (1980).

Ingersoll's contract with Taiwan, as the district court interpreted it, called for under deck stowage. We find no basis in the record upon which to conclude that Ingersoll intentionally relinquished its right to under deck stowage. Ingersoll's silence after receiving constructive notice of the on deck shipment lacks the requisite manifest intent to

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4 *(Continued)*
meaning of "clean" bills of lading is relevant only in assessing Ingersoll's claims against Bernard. *See infra* section IIB.

constitute a waiver. Ingersoll's silence and failure to act can better be characterized as an oversight or carelessness rather than as a waiver of a contractual right. The mere fact that Ingersoll can be deemed to have been informed that its machinery was being shipped to Korea on deck does not mean that the conclusion must be drawn that it knowingly consented to a modification of the original contract.

Next, Taiwan contends that Gryphon was Ingersoll's agent and therefore that Ingersoll was bound by the contracts entered into by Gryphon. Taiwan claims that if Gryphon was aware during booking that Order # 24441 was going to be shipped on deck, Ingersoll would be bound by that knowledge. However, the district court specifically found that Gryphon was Taiwan's agent.[5] This finding may not be reversed unless clearly erroneous. *O'Connell Mach. Co. v. M.V. "Americana"*, 797 F.2d 1130, 1133 (2d Cir. 1986). It appears that there is sufficient evidence in the record to support this finding. For instance, Gryphon paid Bernard its brokerage commission on Taiwan's behalf. Bernard also sent a copy of the master ditto bill of lading to Gryphon to prepare the bill of lading, which Gryphon would be likely to do if it was Taiwan's agent. Moreover, Taiwan paid Gryphon a finder's fee for obtaining the

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[5] Taiwan asserts that the agency issue had already been decided in a related action in the Northern District of Illinois. *Ingersoll Mill. Mach. Co. v. J.E. Bernard & Co.*, 508 F.Supp. 907 (N.D.Ill.1981). However, that court concluded only that Gryphon was more likely Ingersoll's agent than Taiwan's. *Id* at 912. Moreover, the district judge was not bound by that decision because it was rendered on a motion to dismiss for lack of jurisdiction before discovery, and without the benefit of testimony and the emergence of all the evidence. We do not believe the issue had been fully and fairly litigated so as to preclude the district judge from making his own independent finding. *Saylor v. Lindsley*, 391 F.2d 965, 968 (2d Cir.1968); *see also Saez Rivera v. Nissan Mfg. Co.*, 788 F.2d 819, 821 (1st Cir. 1986).

Ingersoll cargo for Taiwan.

Taiwan also contends that even if the initial oral contract called for below deck stowage, Ingersoll's receipt of the bill of lading with the new terms changed the parties' obligations. As Taiwan would have it, only the bill of lading, even if it contains unauthorized terms, represents the contract of carriage. In other words, Taiwan contends it is solely the bill of lading which governs and determines the proper stowage of the cargo. While it is true that a bill of lading may under certain circumstances constitute the contract of carriage between the parties. *see CIA. Platamon de Navegacion, S.A. v. Empresa Colombiana de Petroleos*, 478 F.Supp. 66, 67 (S.D.N.Y.1979); *see generally 2A Benedict on Admiralty* § 34, at 4-13 (7th ed.1987), Taiwan's argument is not at all persuasive on the evidence in this case. A carrier such as Taiwan may not unilaterally alter a bill of lading so as to bind the shipper without the authorization of the shipper. *See West India Indus. v. Tradex, Tradex Pertroleum Services*, 664 F.2d 946, 949-50 & n. 5 (5th Cir.1981). A carrier cannot impose on deck stowage on a shipper merely by including a notation in the bill of lading which it delivers after the voyage commences. To allow a carrier after the fact to impose on the shipper an unauthorized change of terms would run counter to the general proposition that without its contrary agreement, a shipper is entitled to expect below deck stowage. *See St. Johns N.F. Shipping Corp.*, 263 U.S. at 124, 44 S.Ct. at 30; *Encyclopaedia Britannica, Inc.*, 422 F.2d at 14 & n. 5. Under the circumstances presented herein, the contract of carriage which governed the obligations of Ingersoll and Taiwan was the one orally entered into in August 1979 and not the altered bill of lading.

Finally, Taiwan argues that Ingersoll had the burden of showing that the damage was caused by Taiwan's negligence and, in any case, that its liability should be limited to $500 per package pursuant to the Carriage of Goods

by Sea Act ("COGSA"), 46 U.S.C. § 1300 *et seq.* (1982 & Supp.1983), which the bill of lading incorporated by reference. We reject both of these contentions. First, as shown above, Taiwan's stowage of Ingersoll's cargo on deck without Ingersoll's permission was a breach of the contract of carriage. A showing the Taiwan was negligent by such stowage is not relevant to or necessary for establishing a breach of contract. Second, where, as here, a carrier had materially deviated from the terms of the contract of carriage, monetary limits contained in COGSA and in bills of lading are inapplicable; rather, the carrier is liable in full as an insurer of the cargo. *General Elec. Co. Int'l Sales Div. v. S.S. Nancy Lykes*, 706 F.2d 80, 87 (2d Cir.), *cert. denied*, 464 U.S. 849, 104 S.Ct. 157, 78 L.Ed.2d 145 (1983); *Calmaquip Eng'g West Hemisphere Corp.*, 650 F.2d at 638-39; *Encyclopaedia Britannica, Inc.*, 422 F.2d at 18. Therefore, because Ingersoll's cargo was stowed on deck in breach of the contract of carriage, Ingersoll's recovery is not contingent upon a showing of negligence, and Taiwan cannot benefit from the limits of liability in the bill of lading or in COGSA.

II.
BERNARD

A. Admiralty Jurisdiction

As a preliminary matter, Bernard challenges the district court's assertion of subject matter jurisdiction. Since there does not appear to be diversity or federal question jurisdiction, subject matter jurisdiction must reside, if at all, under 28 U.S.C. § 1333, which provides for admiralty or maritime jurisdiction in the federal courts. Bernard, seeking to avoid the application of admiralty jurisdiction, characterizes its contract with Ingersoll as one for preliminary brokerage services only incidentally related to the maritime contract between Ingersoll and Taiwan. The district court, after observing that "[f]ederal courts have traditionally exercised admiralty jurisdiction over shipper's claims

against freight forwarders," 619 F.Supp. at 503, held that the services Bernard performed were not preliminary in nature. While we decline to lay down a general rule that freight forwarders are always subject to admiralty jurisdiction, we do hold, for reasons discussed below, that in this instance, Bernard's freight forwarding contract with Ingersoll involved enough tasks of a non-preliminary nature to support admiralty jurisdiction.

We have recognized that '[t]he precise categorization of the contracts that warrant invocation of the federal courts' admiralty jurisdiction has proven particularly elusive." *CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F.2d 377, 379 (2d Cir. 1982). The Supreme Court has cautioned that "[t]he boundaries of admiralty jurisdiction over contracts as opposed to torts or crimes – being conceptual rather than spatial, have always been difficult to draw." *Kossick v. United Fruit Co.*, 365 U.S. 731, 735, 81 S.Ct. 886, 890, 6 L.Ed.2d 56 (1961). A long recognized principle for determining whether a contract is maritime is that agreements preliminary to maritime contracts are not cognizable in admiralty. *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798, 801 (2d Cir.1984), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985); 1 *Benedict on Admiralty* § 184, at 11-8 (7th ed. 1985). Applying this principle, our Court, despite questioning its continuing validity, has recently affirmed the longstanding, well settled rule laid down by the Supreme Court in *Minturn v. Maynard*, 58 U.S. (17 How.) 477, 15 L.Ed. 235 (1854), that general agency contracts are not cognizable in admiralty. *Peralta Shipping*, 739 F.2d at 804. General agency contracts are those that call for a "husbanding" of a vessel, that is, arranging for performance of a variety of services preliminary to maritime contracts, such as soliciting cargo or passengers, and procuring supplies, crews, stevedores, and tugboats. Thus, in *Peralta Shipping*, this Court held that a contract which

included a duty to supervise the performance of maritime contracts did not warrant admiralty jurisdiction. *Id.* at 803.

Bernard argues that freight forwarding contracts fall within the ambit of general agency contracts and are therefore excluded from admiralty consideration. Courts that have specifically dealt with admiralty jurisdiction over freight forwarders appear to have arrived at different conclusions. *Compare Outbound Maritime Corp. v. P.T. Indonesian Consortium of Constr. Indus.*, 575 F. Supp. 1222, 1223-24 (S.D.N.Y.1983) (freight forwarder subject to admiralty jurisdiction) *with Johnson Products Co. v. M/V La Molinera*, 619 F.Supp. 764, 767 (S.D.N.Y.1985) (freight forwarder not subject to admiralty jurisdiction). However, the focus of our inquiry must be not on the name assigned to the contract, but rather on the nature of the services to be performed. It is the character of the work to be performed under the contract that is determinative of whether the agreement was maritime. *Hinkins S.S. Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411, 412 (9th Cir.1974); *see also North Pac. S.S. Co. v. Hill Bros. Marine Ry. & Shipbld. Co.*, 249 U.S. 119, 125, 39 S.Ct. 221, 222, 63 L.Ed, 510 (1919); *James Richardson & Sons v. Conners Marine Co.*, 141 F.2d 226, 228 (2d Cir.1944). If the subject matter of the contract " 'relat[es] to a ship in its use as such, or to commerce or to navigation on navigable waters, or to transportation by sea or to maritime employment' " it is fairly said to constitute a maritime contract. *CTI-Container Leasing Corp.*, 682 F.2d at 379 (quoting 1 *Benedict on Admiralty* § 183, at 11-6 (7th ed. 1981)). Accordingly, we turn to an examination of the services to be performed by Bernard under its contract with Ingersoll.

Of the thirteen services listed by the Federal Maritime Commission which a freight forwarder may perform at the request of the shipper, 46 C.F.R. § 510.2(h), Ingersoll asked Bernard to undertake six. Bernard was obligated to pre-

pare and process export declarations; to prepare and process delivery orders or dock receipts; to prepare and process ocean bills of lading, including the preparation and forwarding of a master ditto; to prepare and send advance notification of shipments or other documents to banks, shippers, or consignees; to handle freight or other monies advanced by the shipper or to remit or advance freight or other monies or credit in connection with the dispatching of shipments; and together with Ingersoll, to coordinate the movement of shipments from origin to vessel.

Although Bernard's services may not have included *all* the services a freight forwarder traditionally performs for a shipper, it is not upon the number of services that we focus but rather on their nature. The preparation and processing of export declarations, delivery orders, dock receipts, bills of lading, and advance notification of shipment are not services rendered preliminary to a voyage, rather they are essential to it. Without these, there can be no voyage. Specifically, we note that the district court found that Bernard's obligation with regard to the bills of lading was twofold. First, Bernard was engaged to *secure* clean on board bills of lading. Additionally, on receipt of the bills of lading, Bernard was to *review* the copies it received and to *advise* Ingersoll if in fact they were not clean. 619 F.Supp. at 502. Bernard's duty to secure clean bills of lading is akin to the issuance of bills of lading themselves. An obligation to procure a bill of lading for an ocean shipment, in our view, is a contract relating to transportation by sea. The procurement of the proper papers and documents relating to shipment by sea is an essential and integral part of the shipping process; a contract to obtain those papers, therefore, falls squarely within the admiralty jurisdiction of the federal courts.

Bernard relies heavily on *Johnson Products*, which held that the forwarding of a bill of lading does not in itself create a maritime contract. We believe that *Johnson*

Products is distinguishable from this case. In that case, the obligation of the freight forwarder was merely to pass along the bill of lading that was issued by the carrier. 619 F.Supp. at 767. Herein, Bernard's obligation to Ingersoll was to do more than merely transfer documents. Bernard had an affirmative obligation to *secure* clean bills. Its responsibilities did not begin when the completed bills of lading first arrived on its desk. Bernard was engaged to ensure that Ingersoll's cargo would be properly loaded on board the M/V Bodena so that the proper bills of lading would be issued. Thus, having undertaken to arrange for the proper loading of the cargo onto the vessel, as well as other tasks of a nonpreliminary nature, we conclude that Bernard's contract with Ingersoll can fairly be characterized as a maritime contract supportive of admiralty jurisdiction.

B. Breach of Contract

Bernard's contract with Ingersoll called for Bernard to perform a number of services typically associated with a general freight forwarder. Bernard's contention that its duties were more limited in scope than those generally performed by freight forwarders is not pivotal in determining whether Bernard breached its contract with Ingersoll. Our focus must be on the specific obligations involved and whether Bernard satisfactorily performed them. As noted, the district court found that two of the tasks to be performed by Bernard related to the bills of lading. Bernard was bound initially to secure clean on board bills of lading for Ingersoll. Moreover, Bernard was bound to examine the bills of lading once they had been issued by Taiwan and to inform Ingersoll of any imperfections. The district court held that Bernard failed in both respects: it failed in its obligation to procure clean bills, and it failed to examine the copies it received and to advise Ingersoll that in fact they were not clean. 619 F.Supp. at 502. We find no clear error in the district court's finding that Bernard failed in

its primary duty, namely, to supply the clean bills. We therefore find it unnecessary to reach the secondary question, whether Bernard also failed to review the bills for imperfections.

1. "Clean" on Board Bills of Lading

Bernard contends that the bills of lading that it supplied were in fact clean. According to Bernard, the notation of the words "on deck shipper's risk" did not render the bills unclean. In Bernard's view, a "clean" bill of lading requires only that the shipping document bear no notation on its face that expressly declares a defective condition of the goods. In other words, it contends, a "clean" bill of lading indicates that the goods were not received by the carrier in damaged condition at the time of shipment. The phrase "on deck shipper's risk," Bernard argues, is a clause which does not describe the physical condition of the goods at the time of receipt by the carrier, but rather relates instead to who bears the risk during voyage. So interpreted, a notation declaring that the shipper bears the risk of damage during the voyage would not affect the cleanliness of the bills. We disagree with Bernard's interpretation.

It is no doubt true, as Bernard claims, that a "clean" bill of lading refers to the undamaged condition of the cargo at the time it is received by the carrier. *Vana Trading Co. v. S.S. 'Mette Skou"*, 556 F.2d 100, 103 n. 4 (2d Cir.), *cert. denied*, 434 U.S. 892, 98 S.Ct. 267, 54 L.Ed.2d 177 (1977); C. Gilmore & C. Black, Jr., *The Law of Admiralty* § 3-13, at 122 (2d ed. 1975). However, a "clean" bill of lading refers to more than just the condition of the goods. It has long been recognized in admiralty custom and practice that a "clean" bill of lading refers also to the place on a ship where cargo is to be stowed.[6] "[A] clean bill of lading imports that the

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[6]The meaning of a "clean" bill of lading is one firmly established by the custom and practice of the maritime industry.

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goods are to be safely and properly stowed *under deck." The Delaware*, 81 U.S. (14 Wall.) 579, 602, 20 L.Ed. 779 (1871) (emphasis added); *see Seguros Banvenez, S.A. v. S/S Oliver Drescher*, 761 F.2d 855, 859 (2d Cir.1985). Noted admiralty commentators agree that a "clean" bill of lading denotes a bill that is either silent as to stowage, thereby imputing that the cargo is to be stowed below deck, or provides for under deck stowage. 2A *Benedict on Admiralty* § 97, at 9-12 (7th ed. 1987) ("[t]he issuance of a clean bill of lading – one which does not specifically provide for on-deck stowage – obligates the carrier to stow the cargo under deck"); *id.* § 123, at 12-10("[a] clean bill of lading imputes under-deck stowage"); A. Knauth, *Ocean Bills of Lading* 237 (2d ed. 1941) ("[a] 'clean' bill of lading is an unwritten representation that the cargo would be carried under deck"). Thus, when a shipper requests a "clean" bill of lading it expects to receive from the carrier a document which either specifically notes that stowage is under deck, *see Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 59 (2d Cir.1985), or is silent as to stowage, *see The Idefjord*, 114 F.2d 262, 266 (2d Cir.) *cert. denied*, 311 U.S. 707, 61 S.Ct. 175, 85 L.Ed. 459 (1940). If the document is silent as to stowage, the assumption is that the goods have been stowed below deck. In other words, a request for a "clean" bill of lading is an implied request for stowage below deck.

Ingersoll's instruction to Bernard in its letter of September 10, 1979, was to provide "clean" on board bills of lading. Bernard therefore, was duty bound to supply bills that noted or implied that stowage was below deck. Contrary to Ingersoll's instructions, the bills actually pro-

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6 *(Continued)*

Its meaning is not ambiguous, and, therefore, the parties' intention in using that term does not govern, as Bernard argues it should. The district court properly did not employ contractual rules of construction, such as the intent of the parties at the time of contracting, in interpreting its meaning.

vided by Bernard contained a notation indicating that the goods had been stowed on deck. Thus, Bernard plainly breached its contract with Ingersol.

2. Causation

Bernard also contends that even if it failed to supply "clean" bills of lading to Ingersoll, its breach of contract was not causally connected to the damage to Order # 24441. Essentially, Bernard argues that even if it had reviewed the bills and found the notation, the damage to the cargo would still have occurred. By the time the notation was detected, the cargo was already on deck and at sea. Therefore, according to Bernard, its failure to advise Ingersoll that the bills bore the clause "on deck" did not cause or contribute to the damage.

Bernard's contention might have some merit were its only contractual duty to review the bills after they had been issued. In such case, given that Bernard received the documents on October 1 and that the M/V Bodena did not actually leave the United States bound for Korea until October 14, the feasibility of unloading the cargo at another U.S. port prior to sailing would be a crucial issue. The district court did not decide whether unloading was a viable option because of a dearth of evidence. 619 F.Supp. at 502. However, the question of whether the cargo could have somehow been saved between October 1 and October 14 is not determinative of Bernard's liability. Bernard's contractual obligation was not only to review the bills of lading for defects but also to secure clean bills in the first instance. Having failed to ensure that the cargo was placed below deck, thereby breaching its contract by causing a bill that was not "clean" to be issued, Bernard can be said to have proximately caused Ingersoll's damages.

We reject Bernard's contention that all it was obligated to do was transmit faithfully to Taiwan Ingersoll's request for "clean" bills of lading, and once having relayed those instructions, to transfer the issued documents upon receipt

to Ingersoll. It is reasonable to assume that the hiring of Bernard as a freight forwarder contemplated not simply the handling of documents and the removal of any markings which would render the bills unclean should such markings appear; rather, Bernard was retained to assure in advance that proper documents would be provided. It was Bernard's responsibility to see that Ingersoll received the requested documents and thus to assure the safe journey Ingersoll anticipated as a result of its request. Bernard did not take preventative or corrective action to assure this result. Bernard should have monitored the loading process in New Orleans to assure that the proper bills could be issued. Its failure to do so was a breach of contract resulting in damages to Ingersoll.

III.
CROSS-CLAIMS OF TAIWAN AND BERNARD

The district court properly dismissed the claims asserted by Taiwan and Bernard for indemnity against each other. Indemnity rests upon the principle that the true wrongdoer should bear the ultimate burden of payment. *Ross v. Penn Cent. Transp. Co.*, 433 F.Supp. 306, 309 (W.D.N.Y.1977). There can be no indemnity as between parties that each bear primary responsibility for a wrong regardless of their relative degrees of fault. *Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 318 (3d Cir.), *cert. denied*, ___ U.S. ___, 106 S. Ct. 384, 88 L.Ed.2d 337 (1985). Having concluded that Taiwan and Bernard each breached their separate contracts with Ingersoll, the district court properly held them jointly and severally liable and dismissed their respective claims for indemnity.

IV.
FIREMAN'S FUND

A. Liability on the Policy

Fireman's Fund contends that the district court erred in finding that Ingersoll's policy covered the damage sustained by Order # 24441. Essentially, the Fund contends on appeal that clause 17(b) of the policy, which denies coverage for partial loss of on deck shipments, should apply to deny coverage because part of Ingersoll's cargo was actually stowed on deck. We disagree. As we discuss below, the district court was justified in finding the policy ambiguous, construing it against Fireman's Fund, and applying clause 17(a) of the policy, which covers all risks of loss in cases of under deck shipments.

Ingersoll's policy with Fireman's Fund was an open cargo policy. Such a policy is a master policy which covers all of an insured's shipments. An insured declares a particular shipment either by sending the Fund a copy of an insurance certificate or a monthly declaration of shipments. One of the advantages of this type of policy is that an insured has automatic coverage for a shipment even if it neglects to declare the shipment, or if the certificate is not issued until the cargo has arrived and a loss has already occurred. Under the subject policy, different types of shipments were accorded different types of coverage. Certain shipments were insured on an all risk basis (clause 17(a)), that is, against all risks of physical loss or damage from any external cause; other types of shipments were insured free of particular average (clause 17(b)), that is, partial losses were not covered; still others were subject to monetary limits (clause 8(B(2)).

In August 1979, before shipping order # 24441, Ingersoll sent Fireman's Fund an insurance certificate to declare and insure the machine. The certificate stated that the goods were stowed under deck and were insured against all risks. The certificate became effective on

August 31, 1979. In fact, the bulk of the shipment was stowed on deck and the bill of lading was marked "on deck shipper's risk" without Ingersoll's consent. Ingersoll notified Fireman's Fund of the damage to the cargo in December 1979. The Fund denied Ingersoll's claim by letter dated May 23, 1980.

Marine insurance contracts are governed by federal admiralty law when there is an established federal rule, and by state law when there is not. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313-14, 75 S.Ct. 368, 370-71, 99 L.Ed. 337 (1955); *Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 190 (2d Cir.1970). The parties do not dispute that to the extent that federal admiralty rules do not exist, the interpretation of the policy is governed by Illinois law.

The starting point in interpreting an insurance policy is to determine whether the policy terms are ambiguous. As a general rule, plain or unambiguous language will be given its ordinary meaning and effect, and the need to resort to rules of construction arises only when an ambiguity exists. *National Fidelity Life Ins. Co. v. Karaganis*, 811 F.2d 357, 361 (7th Cir.1987); *Chicago Bd. Options Exch., Inc. v. Connecticut Gen. Life Ins. Co.*, 713 F.2d 254, 257-58 (7th Cir.1983). Courts may not create an ambiguity where none exists. *Simmons Refinding Co. v. Royal-Globe Ins. Co.*, 543 F.2d 1195, 1197 (7th Cir.1976); *State Farm Mut. Auto. Ins. Co. v. Berke*, 123 Ill.App.2d 455, 258 N.E.2d 838, 841 (1970). If an insurance contract is ambiguous it will generally be construed against the insurer who drafted it in order to promote coverage for losses to which the policy relates. *Karagansis*, 811 F.2d at 361; *FSC Paper Corp. v. Sun Ins. Co. of N.Y.*, 744 F.2d 1279, 1282 (7th Cir.1984). This principle applies to all types of insurance policies including maritime policies. *Kalmbach, Inc. v. Insurance Co. of Pa.*, 529 F.2d 552, 555 (9th Cir.1976) (citing Illinois cases). The rule that insurance policies are to be con-

strued in favor of the insured is most rigorously applied in construing the meaning of exclusions incorporated into a policy of insurance or provisions seeking to narrow the insurer's liability. *Sears, Roebuck & Co. v. Reliance Ins. Co.*, 654 F.2d 494, 499 (7th Cir.1981). Accordingly, we turn first to the question of whether Ingersoll's policy is ambiguous.

Fireman's Fund's argument that the policy provisions are unambiguous has surface appeal. Clause 17)a) is encaptioned 'UNDER DECK shipments" and clause 17(b) is encaptioned "ON DECK shipments." At first glance, these captions would seem to indicate that it is the actual, physical place of stowage which governs the applicability of the clauses. Cargo actually stowed under deck would be governed by clause 17(a), and cargo actually stowed on deck would fall within clause 17(b). However, a closer, more careful reading of the policy reveals that the provisions at issue are in fact ambiguous.[7]

Looking at the insurance contract as a whole, as we must, *Michigan Chem. Corp. v. American Home Assurance Co.*, 728 F.2d 374, 377 (6th Cir.1984) (applying Illinois law), we fund clauses 17(a) and 17(b) subject to varying interpretations. A contract that is reasonably and fairly susceptible of more than one meaning is said to be ambiguous. *Karaganis*, 811 F.2d at 361; *Sunstream Jet Express*,

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[7] Fireman's Fund contends that the district court improperly considered parol evidence (testimony of Fund officials to the effect that cargo on deck without the insured's consent but with an under deck bill of lading would be covered by clause 17(a)) in finding an ambiguity in the policy. We disagree. As explained, the district court could properly have found the policy ambiguous on its face. Moreover, under Illinois law, '[i]n determining whether an ambiguity exists, as a matter of law, the trial court may consider parol and extrinsic evidence." *Sunstream Jet Express, Inc. v. International Air Serv. Co.*, 734 F.2d 1258, 1268 (7th Cir.1984) (citing cases).

Inc. v. International Air Serv. Co., 734 F.2d 1258, 1269 (7th Cir.1984). Neither clause 17(a) or 17(b) makes reference on its face to the bills of lading or to the contract of carriage under which the shipments were to travel.[8] Nor do clauses 17(a) or 17(b) refer to the consent of the insured in deciding where its cargo is to be placed. However, another provision of the policy, clause 8(B(2), specifically places a monetary ceiling on shipments that travel either "subject to On Deck ocean bill(s) of lading" or are "stowed On Deck with consent of the Assured." Where one part of the policy is specific and another general, it is incumbent upon the court to resolve the question of what relationship each part bears to the other. Clauses 17(a) and 17(b) could conceivably refer to any one or to a combination of many possible situations. Coverage under these clauses might be determined by the actual physical place of stowage, the bill of lading under which the cargo traveled, the contract of carriage for the shipment, or the consent of the insured as to where its cargo should be stowed. It simply is not clear from the face of the policy when coverage under clauses 17(a) or 17(b) would be in effect.

Having concluded that the policy terms are ambiguous, we turn next to the construction of those terms. In our view, the district court properly construed the policy in favor of the insured. We think a fair and reasonable interpretation of the policy suggests that "UNDER DECK shipments" of clause 17(a) refers to shipments that were supposed to travel under deck. In other words, when an insured has contracted with its carrier for shipment of cargo below deck, clause 17(a) applies. It is irrelevant whether the cargo actually traveled below deck or whether

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[8] Clause 17(a) does refer to the bills of lading under which *containerized* shipments travel. It does not, however, mention bills of lading with regard to other types of shipments. Mentioning one type of shipment and not other types, in our view, only adds to the ambiguity of the clause.

the cargo was shipped pursuant to an under deck bill of lading, or, as in this case, pursuant to an unauthorized on deck bill of lading. The place of physical stowage or the bill of lading is not determinative of coverage; it is the contract of carriage that governs. As long as the shipper intended the cargo to be stowed below deck and so manifested its intent in its contract of carriage, clause 17(a) applies. Similarly, "ON DECK shipments" of clause 17(b) refers to all shipments that were supposed to travel on deck. In such an instance, a lesser degree of coverage is provided. In those cases, coverage is provided only for a total loss and only when that loss occurs as a result of certain perils. No coverage whatsoever is provided for fortuitous partial losses caused even by an insured-against peril. Furthermore, clause 8(B)(2) would appear to provide an additional limitation on clause 17(b), limiting the maximum possible recovery to $175,000 if the cargo was shipped subject to an on deck bill of lading or stowed on deck with the insured's consent. Construction of the policy in this manner comports with the logical assumption that an insurance company would provide, and an insured would buy, greater protection for shipments that were supposed to travel under deck than for shipments intended to be placed on deck. Accordingly, applying this construction to the facts herein, we believe it is clear that clause 17(a) is the operative provision. As discussed, Ingersoll's contract of carriage with Taiwan required under deck stowage. This being so, the provision which relates to shipments that were intended to travel below deck, namely clause 17(a), must govern.

Under clause 17(a), Ingersoll's loss would have been covered. Clause 17(a) insures against "all risks of physical loss or damage from any external cause." All risk coverage covers all losses which are fortuitous no matter what caused the loss, including the insured's negligence, unless the insured expressly advises otherwise. *Goodman v. Fireman's Fund Ins. Co.*, 600 F.2d 1040, 1042 (4th

Cir.1979). A loss is fortuitous unless it results from an inherent defect, ordinary wear and tear, or intentional misconduct of the insured. *Id.* An insured satisfies its burden of proving that its loss resulted from an insured peril if the cargo was damaged while the policy was in force and the loss was fortuitous. *Atlantic Lines Ltd. v. American Motorists Ins. Co.*, 547 F.2d 11, 12 (2d Cir.1976); *accord Morrison Grain Co. v. Utica Mut. Ins. Co.*, 632 F.2d 424, 430-31 (5th Cir. 1980). The circumstances surrounding the placement of the Ingersoll cargo on deck and the resultant loss can fairly be characterized as fortuitous. It was the carrier that breached the contract of carriage by placing the cargo on deck. Ingersoll certainly did not engage in any intentional misconduct to cause the misplacement of its cargo. Moreover, even if the carrier was negligent in placing the cargo outside the area of the ship's hold, all risk coverage would still apply.

Construing Ingersoll's policy as providing full coverage for shipments stowed on deck without the shipper's consent is consistent with the purpose for which the policy was issued. All risk open cargo policies, such as the one issued to Ingersoll, provide broad coverage for shippers. *See, e.g., Green v. Cheetham*, 293 F.2d 933 (2d Cir.1961); *Groban v. S.S. Pegu*, 331 F.Supp. 883 (S.D.N.Y.1971), *aff'd sub nom. Groban v. American Casualty Ins. Co.*, 456 F.2d 685 (2d Cir.1972). A shipper not located near a port has no practical control over how a steamship line may ultimately carry and protect its cargo. Even if it issues clear instructions as to stowage directly to the carrier, it has no guarantee that the carrier will comply. A carrier may negligently or inadvertently place cargo intended to be stowed below deck, above deck. A shipper may reasonably seek to avoid exposing itself to the potential risk of damage and to consequential losses by procuring insurance. To hold that Ingersoll's loss was not covered would be to render the insurance that it purchased from Fireman's Fund meaningless. It is not at all unreasonable to assume that Ingersoll procured insurance precisely to cover itself in situations

such as this one–where the carrier placed its cargo on deck without Ingersoll's consent.

Fireman's Fund also argues that it should not be held liable under the policy because Ingersoll has a duty to inform the Fund after it learned of the on deck placement of its cargo on October 1, 1979. The Fund contends that had it been so advised, it would have instructed Ingersoll to get the cargo under deck or off the ship before the M/V Bodena sailed for Korea on October 14.[9] Violations of this duty to disclose, the Fund claims, voids the policy under the doctrine of *uberrimae fidei*.

The doctrine of *uberrimae fidei* requires a party seeking marine insurance to disclose all circumstances known to it which materially affect the risk. *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 13 (2d Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 1570, 94 L.Ed.2d 762 (1987); *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866, 870 (2d Cir.1985). If a party omits to disclose material information applicable to the risk involved, the policy is void. *Knight*, 804 F.2d at 13; *Thebes Shipping, Inc. v. Assicurazioni Ausonia SPA*, 599 F.Supp. 405, 426 (S.D.N.Y.1984) (quoting *McLanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 185-86, 7 L.Ed. 98 (1828)). However, in our view, the doctrine is not applicable in the instant case. As discussed, clause 17(a) of Fireman's Fund's pol-

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[9] Fireman's Fund makes a similar argument with regard to mitigation of damages. The Fund argues that Ingersoll failed to take any steps to remove the cargo from danger despite its knowledge as of October 1 that the cargo was stowed on deck and likely to incur damage. However, the burden of proving a failure to mitigate damages falls on the insurer. *Emmco Ins. Co. v. Wallenius Carribbean Line*, S.A., 492 F.2d 508, 514 (5th Cir.1974). The district court concluded that there was a "dearth of evidence" to show that unloading was a real and viable option and that appellants failed to meet their burden. 619 F.Supp. at 502.

icy provided coverage for shipments traveling pursuant to upper deck contracts of carriage. As interpreted hereinabove, Ingersoll's contract of carriage with Taiwan was one for under deck stowage. The fact that Ingersoll's cargo was actually stowed on deck, in breach of the contract of carriage, did not change the terms of the contract. Similarly, the fact that Ingersoll had constructive notice as of October 1 of that breach also did not change the terms of the contract of carriage or Ingersoll's rights thereunder. See section I, *supra*. Ingersoll's contract remained one for under deck shipment throughout the voyage. Since there was never any change in Ingersoll's contract of carriage, there was no change in circumstances affecting the risk insured which Ingersoll might have been required to disclose. The subject open cargo policy does not distinguish between under deck contracts of carriage that are performed and those that are breached. Coverage is provided for all shipments traveling pursuant to under deck contracts of carriage. Consequently, Ingersoll had no duty to inform Fireman's Fund that its cargo had been stowed on deck in breach of the contract of carriage. Indeed, it was to protect against just such an occurrence that Ingersoll most likely contracted for insurance in the first place.

B. Fireman's Fund's Right of Subrogation Against Bernard and Taiwan

The district court properly ordered that to the extent Fireman's Fund makes payments to Ingersoll under its policy, it is entitled to recover such payments from Taiwan and Bernard, including taxable costs but excluding attorney's fees and litigation expenses. It is well settled that an insurer has an equitable right of subrogation as a matter of law upon making payment to its insured for a cargo loss. *Meredith v. The Ionian Trader*, 279 F.2d 471, 474 (2d Cir.1960). Bernard errs in contending that the Fund's failure to fulfill its contractual obligation to Ingersoll precludes it from being granted equitable subrogation. An

insurance company retains its right of subrogation even after it litigates coverage and suffers a judgment requiring payment to the insured. *Id.*; *see also Bunge Corp. v. London and Overseas Ins. Co.*, 394 F.2d 496, 497 (2d Cir.), *cert. denied*, 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363 (1968).

C. Attorney's Fees and Litigation Expenses

The district court awarded Ingersoll attorney's fees ($590,381.96) and litigation expenses ($226,250.96) against Fireman's Fund for costs it incurred in prosecuting its suit against Fireman's Fund and the other defendants. Although the district court did not specifically apportion the fees and expenses allocable to the various defendants, it did advance two different theories to support the award. First, Ingersoll's fees and expenses incurred in suing Bernard, Taiwan, and Excellent Marine were awarded as compensatory damages, to make Ingersoll whole. Second, the fees and expenses incurred in suing the Fund were awarded because of the Fund's apparent bad faith in denying Ingersoll's claim.

Apropos the fees and expenses attributable to Ingersoll's suit against Bernard, Taiwan, and Excellent Marine, those fees were a direct and foreseeable consequence of Fireman's Fund's breach. As a result of the refusal of Fireman's Fund to cover the loss, Ingersoll was forced to sue third parties and to bear the burdens of complex litigation. Where a breach of contract has caused a party to maintain a suit against a third person, courts have permitted recovery from the breaching party of counsel fees and other litigation expenses incurred in the suit. *Artvale, Inc. v. Rugby Fabrics Corp.*, 232 F.Supp. 814, 826 (S.D.N.Y.1964), *aff'd*, 363 F.2d 1002 (2d Cir. 1966); *accord Ranger Constr. Co. v. Prince William County School Bd.*, 605 F.2d 1298, 1301 (4th Cir.1979); *see Freed v. Travelers*, 300 F.2d 395, 399 (7th Cir.1962) (attorney's fees and expenses of litigation incurred in action against

third parties proper elements of damage in action against insurer). Therefore, since the Fireman's Fund's breach necessitated Ingersoll's suit against other defendants, the Fund was properly held responsible for Ingersoll's attorney's fees and litigation expenses. Fireman's Fund may not recover those costs from the other defendants, as it argues it should, because in the ordinary course, it could have paid Ingersoll's claim and then commenced its own litigation against the other defendants as Ingersoll's subrogee. In such an action, the Fund would have had to bear its own fees and expenses.

Second, apropos the fees and expenses attributable to Ingersoll's suit against Fireman's Fund, the general rule is that the award of fees and expenses in admiralty actions is discretionary with the district judge upon a finding of bad faith. *Seguros Banvenez, S.A.*, 761 F.2d at 861-62. As a party subject to admiralty jurisdiction, *Big Lift Shipping Co. (N.A.) v. Bellefonte Ins. Co.*, 594 F.Supp. 701, 704 (S.D.N.Y.1984), marine insurers also are subject to this rule. *See Puritan Ins. Co.*, 779 F.2d at 873. We acknowledge an awareness of the district judge's dissatisfaction with Fireman's Fund for refusing to pay Ingersoll's claim. Judge Carter characterized explanations given by Fireman's Fund as "*contrived, concocted* solely to keep from paying" its obligations under the policy. 619 F.Supp. at 506 (emphasis added). Moreover, noting conflicting and inconsistent testimony among Fund officials, he observed that "Fireman's Fund had *conjured* up its *strained* reading of the insurance policy solely in an effort to avoid accepting the liability the policy imposed." *Id.* at 507 (emphasis added). However, we note that the district court never explicitly found that Fireman's Fund acted in bad faith in denying Ingersoll's claim. In light of the ambiguity inherent in the Fund's policy and our lengthy discussion herein necessary to analyze the ambiguity, we cannot conclude that the Fund was unjustified in rejecting Ingersoll's claim. Whether the damage to Order # 24441 was covered under

the Fireman's Fund open cargo policy seems to us to be a difficult issue, one which constitutes a perfectly valid basis for contest and litigation. Accordingly, we reverse the award of attorney's fees and litigation expenses insofar as they are allocable to Ingersoll's suit against Fireman's Fund. We remand to the district court to determine, using the method it deems appropriate, how much of the sum total of Ingersoll's attorney's fees and litigation expenses is attributable to its suit against Fireman's Fund and how much to its suit against each of the other defendants and to apportion accordingly.

In its final judgment, dated April 25, 1986, the district court apparently included only those attorney's fees and litigation expenses incurred through August 31, 1985, leaving subsequent expenditures for calculation after any appeal. While we decline to impose attorney's fees and litigation expenses against Fireman's Fund in this Court for prosecuting either a frivolous appeal, Fed.R.App.P.38, or one calculated to achieve delay, 28 U.S.C. § 1912, we do note that in calculating expenditures after August 31, 1985, the district court, in its discretion, in order to make Ingersoll whole, might include those amounts that properly can be attributed to Ingersoll's defending the appeal taken by Bernard and Taiwan. Of course, those fees and expenses that relate to Ingersoll's defense of Fireman's Fund's appeal, as well as those attributable to Ingersoll's cross-appeal, are beyond the scope of the compensatory damage rationale.

V.
DAMAGES and PREJUDGMENT INTEREST

A. Damages

Both Fireman's Fund and Ingersoll dispute the district court's computation of total damages of $977,899. Fireman's Fund seeks to *reduce* the total award by $90,970 which was awarded as damages representing the interest for delay in Ingersoll's receiving contract payments from

Hyundai. The Fund claims that interest for delay is not properly recoverable under its policy. On the other hand, Ingersoll seeks to *increase* its award by $48,287 which represents Waldrich's expense of financing the costs of repairing Order # 24441 and by $157,585 which is said to represent Waldrich's corporate overhead and profit.

Ordinarily, a district court's computation of damages in a cargo case is a factual determination that will not be disturbed on appeal unless it is clearly erroneous. *Seguros Banvenez, S.A.*, 761 F.2d at 861. In our view, the district judge carefully considered all items submitted to him by the parties as elements of damages; he awarded some, and rejected others. As to Fireman's Fund's claim that damages should be reduced, under its policy it was obligated to indemnify Ingersoll in full for its loss which includes Ingersoll's damage for the loss of use of contract payments. As to Ingersoll's claim that damages should be increased, financing costs can reasonably be viewed as a part of overhead; what amount of overhead and profits to award was specifically considered by the district court and included in the final calculation. We find no error in the computation of damages.

B. Interest Rate on Prejudgment Interest

In accordance with our direction that in admiralty cases prejudgment interest "should be granted in the absence of exceptional circumstances," *Mitsui & Co. v. American Export Lines*, 636 F.2d 807, 823 (2d Cir.1981), the district court calculated prejudgment interest from the date of payment for the repairs through the date of judgment. Ingersoll objects to the rate of interest used, contending that the proper rate should have been the rate at which Ingersoll actually invested its excess cash during the periods in question, or alternatively, a single, uniform, constant rate based on the rate for federal paper, as specified in 28 U.S.C. § 1961, which sets forth the method for computation of *postjudgment* interest. The rule in this Circuit,

however, is that the rate of interest used in awarding *prejudgment* interest rests firmly within the sound discretion of the trial court. *Independent Bulk Transp., Inc. v. the Vessel "MORANIA ABACO"*, 676 F.2d 23, 26 (2d Cir.1982). A "[p]laintiff is entitled to the income which the monetary damages would have earned, and that should be measured by interest on short-term, risk-free obligations." *Id.* at 27. In exercising its discretion, the district court determined that rather than using a single Treasury Bill rate applied retroactively over the relevant periods as initially proposed, using an average rate for each period would be fairer because the rate on Treasury Bills was subject to wide fluctuation during those periods. Accordingly, the district court applied rates ranging between 9.676% and 10.112%. We cannot say that in determining prejudgment interest based upon an average of prevailing Treasury Bill rates, which are short-term, risk-free obligations, the district court abused its discretion.

CONCLUSION

To summarize: we hold that (1) Taiwan, Bernard, and Fireman's Fund all breached their respective contracts with Ingersoll and are therefore jointly and severally liable to Ingersoll for damages and prejudgement interest as determined by the district court; (2) Fireman's Fund was properly held responsible only for Ingersoll's attorney's fees and litigation expenses allocable to its suit against Bernard, Taiwan, and Excellent Marine but not for those allocable to its suit against Fireman's Fund; (3) Fireman's Fund may recover from Bernard and Taiwan, to the extent it actually pays Ingersoll's damages (excluding attorney's fees and litigation expenses); and (4) the claims of Bernard and Taiwan against each other for indemnification were properly dismissed.

The judgment of the district court is affirmed in part and reversed in part, and the case is remanded to the district court for the apportionment of attorney's fees and litigation expenses.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 23rd day of October on thousand nine hundred and eighty-seven.

THE INGERSOLL MILLING MACHINE CO.,

Plaintiff-Appellee in 85-7941, 85-7945 and 86-7405,
Plaintiff-Appellant in 86-7413,
Plaintiff-Cross-Appellant in 86-7413 re: 85-7941, 85-7945 and 86-7405,

v.

M/V BODENA, her engines, boilers, etc., EXCELLENT MARINE, INC., TAIWAN INTERNATIONAL LINE LIMITED, J. E. BERNARD & CO. and FIREMANS FUND INSURANCE CO.,

Defendants,

EXCELLENT MARINE, INC.,

Defendant-Appellee in 86-7413,

TAIWAN INTERNATIONAL LINE LIMITED,

Defendant-3rd Party Plaintiff-Appellee in 85-7941
Defendant-Appellant in 86-7405
Defendant-Cross-Appellant in 86-7405 re: 85-7941
Defendant-Cross-Appellee in 86-7413,

J.E. BERNARD & CO.,

Defendant-3rd Party Defendant-Appellant in 85-7941,
Defendant-Cross-Appellee in 86-7405 and 86-7413,

FIREMANS FUND INSURANCE CO.,

Defendant-Appellee in 85-7941 and 86-7405,
Defendant-Appellant in 85-7945,
Defendant-Cross-Appellee in 86-7413.

Docket Nos. 85-7941
85-7945
86-7405
86-7413

UNITED STATES COURT OF APPEALS
FILED
OCT 23 1987
ELAINE B. GOLDSMITH,
CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Defendant-Appellant in 85-7941 Defendant Cross-Appellee in 86-7405 and 86-7413 J.E. BERNARD & CO.

Upon consideration by the panel that heard the appeal it is

Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith,
Clerk

The INGERSOLL MILLING MACHINE COMPANY, Plaintiff,

v.

M/V BODENA, her engines, boilers, etc., Excellent Marine, Inc., and Taiwan International Line Limited, Defendants.

TAIWAN INTERNATIONAL LINE LIMITED, Third-Party Plaintiff,

v.

J.E. BERNARD, & CO., Third-Party Defendant.

The INGERSOLL MILLING MACHINE COMPANY, Plaintiff,

v.

J.E. BERNARD & CO. and Fireman's Fund Insurance Co., Defendants.

Nos. 80 Civ. 6729 (RLC), 81 Civ. 4744 (RLC).

United States District Court, S.D. New York.

Sept. 4, 1985.

619 F.Supp. 493

OPINION

ROBERT L. CARTER, District Judge.

I

The Facts

Plaintiff, the Ingersoll Milling Machine Co. ("Ingersoll"), is principally engaged in the business of manufacturing special design machinery. It is privately owned and operates out of Rockford, Illinois. Plaintiff has brought two actions, 80 Civ. 6729, against the M/V Bodena ("the Bodena"), her engines, etc., Excellent Marine, Inc. ("Excellent Marine") and Taiwan International Line Ltd. ("Taiwan"), and 81 Civ. 4744, against J.E. Bernard & Co. ("Bernard") and Fireman's Fund Insurance Co. ("Fireman's Fund"). The cases have been consolidated for all purposes.

Defendant Excellent Marine is a foreign corporation doing business in Hong Kong and is the owner of the Bodena. Defendant Taiwan is a corporation doing business in Taiwan and has time chartered the Bodena from Excellent Marine pursuant to the terms and conditions of a charter party dated May 9, 1979. Both Excellent Marine and Taiwan are engaged in the business of common carriers of merchandise by water for hire and operated, managed or otherwise controlled the Bodena as a common carrier of merchandise by water for hire between New Orleans and Pusan, Korea, during the period relevant to this litigation. Defendant Bernard is a freight forwarder doing business in Elk Grove Village, Illinois, and other parts of the United States. Defendant Fireman's Fund is a wholly owned subsidiary of the American Express Co., having its principal place of business in San Francisco, California, and doing business throughout the United States.

In January, 1978, Waldrich Siegen, GmbH. ("Waldrich Siegen") a sister corporation to plaintiff and, like plaintiff, a wholly owned subsidiary of Ingersoll International, contracted to sell heavy specially designed machines to Hyundai International, Inc. ("Hyundai") in Korea.

Waldrich Siegen engaged Ingersoll as subcontractor to manufacture Shop Order 24441 ("SO24441"), a ram type, horizontal spindle, traveling column machinery center for Hyundai at a purchase price of $2,108,000 and to arrange for its transportation to Korea.

Sometime in July or August, 1979, John Mellon of Ingersoll contacted Bernard and Gryphon Shipping Services, Inc. ("Gryphon"), a broker and steamship agent in Chicago. He asked William J. Brokamp of Bernard to shop around for freight rates on shipments of machinery to Korea, and asked Michael Malarski of Gryphon about the type of service available on Jin Yang Line for the shipment of machinery to Korea. He gave Malarski an estimate of the sizes of the expected shipments. Both Brokamp and Malarski made the requested inquiries.

Malarski spoke to Arnold Larsen, Vice President of Cathay Pacific Maritime, Taiwan's General Agent in New York, in about mid-August. Larson offered space on the Bodena scheduled to leave New Orleans at the end of September for Korea. Larsen advised Malarski that another Taiwan vessel would also be available in early October, and Larsen agreed that if Malarski secured the Ingersoll cargo for shipment by Taiwan, Gryphon would receive a commission from Taiwan of 1.25-2.50%. and the freight forwarder would receive a commission of 1.25%.

Malarski informed Mellon of the availability of the Taiwan Bodena in September and of another vessel in October. Mellon advised Malarski that he accepted the terms quoted for the Bodena, that the shipment would consist of 20 pieces which accorded with his initial estimate and that Bernard would be the freight forwarder. Malarski advised Brokamp that Taiwan would pay Bernard a commission of 1.25%.

Larsen testified at trial that he told Malarski that the shipment would be on deck since the Bodena had no available cargo space below deck. Malarski disputes being told

or agreeing that the cargo was to be shipped on deck, or being advised that space was a problem on the Bodena. No booking notes were made by either Malarski or Larsen. Neither Larsen's notebook, which contained a chronological record of his booking communications, nor his worksheets noted that the Ingersoll cargo had been booked on deck. Moreover, the evidence at trial showed that there was space below deck when the Ingersoll cargo was stowed.

The shipments of the 20 boxes to New Orleans commenced on August 29, 1979. One box cames from Detroit, and the others left Rockford at various dates and were delivered to New Orleans by truck and rail to the custody of the Cooper Stevedoring Company at Julia Street Wharf in New Orleans. The machinery was packed by Ingersoll employees. Bernard was notified when the boxes left Rockford.

The Ingersoll cargo was loaded on September 26 and 27, 1979. Eighteen of the boxes were stowed on deck when the Bodena left New Orleans on September 27, 1979. When the Bodena left Savannah on October 14, 1979, three boxes of the Ingersoll shipment were stowed below deck.

By letter dated September 10, 1979, Fred Woywod of Ingersoll asked Bernard to secure three original and four copies of clean on board bills of lading, listing ocean freight prepaid. Georgette Seipler, the documentation clerk at Bernard, pursuant to Ingersoll's letter, prepared a master ditto form and the shipper's export declarations. Bernard by letter requested Taiwan to provide three original clean on board bills of lading and at least 10 copies, and on September 25, Bernard sent one master ditto form for the bills of lading and three export declarations to Mid Gulf, Taiwan's agent in New Orleans, and another master ditto form and a copy of the export declarations to Gryphon.

Bernard used the master ditto form to prepare its advance notice of shipment, which was sent to Woywod on September 25, 1979. Bernard's advance notice was simi-

lar to a bill of lading in format and contained the same shipping information that appears on the top half of a bill of lading. The advance notice which Woywod received on September 26, contained no notation as to stowage. Accompanying the advance notice was the following message: "the shipment described above is scheduled for exportation as indicated above . . ." Woywod called Bernard to advise that all the data on the advance notice was correct except the port of discharge should be changed to Pusan. As Woywod recalls his conversation with Seipler, she advised him that the port would be changed to Pusan and shipping charges would be added but that otherwise the bill of lading would mirror the advance notice.

On September 26, Woywod called Brokamp asking for the quickest way to get the bills of lading other than having to wait to have them come by mail. Brokamp suggested that Woywod might pick up the bills of lading at Gryphon in Chicago. On September 28, 1979, Woywod sent a messenger to Gryphon to pick up the documents, but they were not ready. An Ingersoll messenger returned to Chicago on October 1, 1979, picked up the originals and four copies and delivered them to Woywod who saw the documents at the end of the day. Bernard also received copies the same day. The bills of lading contained the words "on deck at shippers risk". Woywod did not know that these words rendered the bills of lading unclean. He did not notice them. However, the phrase was in bold letters for him to see.

The phrase "on deck at shipper's risk" was added to the bills of lading on September 27, 1979, by Mid Gulf, Taiwan's agent. After the vessel sailed, the master of the Bodena mailed the originals and 13 copies to the Chicago area.

Woywod sent copies of the bills of lading to Waldrich Siegen. Apparently, no one at Bernard, Gryphon, Ingersoll or Waldrich Siegen who saw the copies of the bills of lading, at least until preparation for this litigation began, took

note of or recognized the significance of the "on deck at shipper's risk" legend on the bills of lading.

The voyage to Korea was beset with storms, heavy seas and wind. The ship experienced heavy rolling and pitching during parts of the voyage, and ocean water was constantly on deck. Some of the boxes on deck were broken. Substantial quantities of water penetrated the boxes, and sometimes the boxes sat in water to their top.

The Bodena arrived at Pusan on November 29, 1979, and unloaded. Ingersoll's cargo was discharged to Hyundai's stevedore, Kukji Transportation Co. The foreman found one on deck box discolored, some boxes broken and all the bands on the on deck boxes rusty. None of the under deck boxes were in this condition. On November 30, 1979, 17 Ingersoll boxes on deck were entered in the exceptional column on the damage report prepared by the foreman. The cargo was placed on four barges, subsequently discharged and moved to Changwon. K.M. Lee, Hyundai's assistant manager for heavy machinery, observed the discoloration, broken boxes, loose boards and rust on the parts of the machinery he could see. No pictures were taken at that time. At Hyundai's request a survey was taken by H. Lee, a licensed surveyor. The surveyor found discoloration, broken boxes, loose boards, and rust on the bands. He looked inside the boxes and described the surfaces seen as heavily rusted. He took 6 photographs to illustrate the conditions he found. In his report the surveyor described the damage to the cargo as irreparable because of widespread corrosion from sea water and exposure during the voyage.

Ronald Humphries was a service manager in the heavy division at Ingersoll at the time of these events. His assignment was to oversee the erecting of the machine at Changwon, and he went to Korea in December for that purpose. He arrived in Changwon on December 14, 1979. The cargo was located in the Hyundai's heavy fabrication shop. The structure of the building was completed, but some windows

and doors were missing, and the floors were unfinished. The plant itself was about 500 yards from the river estuary. He found the cargo in similar condition to that found by the stevedore foreman on inspecting the cargo on discharge at Pusan, by K.M. Lee, Hyundai's assistant manager for heavy machinery on the cargo's arrival at Changwon and by H. Lee, the surveyor, when he inspected the cargo. Humphries returned to Changwon in March, 1980, and found the machinery in the same condition he had noted in December, 1979.

Plaintiff has an all risk policy with Fireman's Fund. This is an open marine cargo policy which covered all of Ingersoll's shipments. Ingersoll filled out a certificate of insurance for each shipment, indicating the contents of the cargo, its value, destination and the carrier. A particular shipment became covered under the policy when Ingersoll sent Fireman's Fund a copy of the certificate of insurance, or when Ingersoll issued a monthly declaration covering all shipments for that month. All shipments were automatically covered even if the certificate or monthly declaration was sent after a loss had occurred.

The pertinent provisions of the policy are set out below:

INSURING CLAUSES

PERILS CLAUSE 16.

> Touching the adventures and perils which this Company is content to bear, and take upon itself in this voyage, they are of the Seas, Fires, Assailing Thieves, Jettisons, Barratry of the Master and Mariners, and all other like perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandise or any part thereof.

AVERAGE CLAUSES 17.

(a) UNDER DECK shipments–Including containerized shipments under optional On Deck &/or Under Deck bill(s) of lading are insured. Warranted free from Particular Average unless the vessel or craft be stranded, sunk or burnt, but notwithstanding this warranty this Company is to pay any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and/or craft and/or conveyance with any external substance (ice included) other than water, or to discharge of cargo at port of distress. The foregoing warranty, however shall not apply where broader terms of Average are provided for hereinafter.

BROADER TERMS:

Insured against all risks of physical loss or damage from any external cause irrespective of percentage, including theft, pilferage and/or non-delivery, but excluding, nevertheless, the risks of war, strikes, riots, seizure, detainment, confiscation, requisition, nationalization and other risks excluded by the "F.C.&S. and/or S.R. & C.C." warranties in the printed portion of the policy except to the extent that such risks may be specifically covered by endorsement, also warranted free from any claims arising out of the inherent vice of the goods insured or consequent upon loss of time and/or market. (b) **ON DECK** shipments are insured:–

Warranted free of particular average unless caused by the vessel and/or interest insured being stranded, sunk, burnt, on fire or in collision with another ship or vessel or with ice or with any substance other than water, but liable for jettision and/or washing overboard, irrespective of percentage. The foregoing warranty, however, shall not apply when broader terms of Average are provided for hereinafter.

Clause 17(a) of the policy provides for full coverage of up to $2.5 million for all under deck shipments. Clause 17(b) negates coverage for partial loss of on deck shipments and, if covered, these shipments are insured only to a limit of $175,000 pursuant to clause 8(B)(2).

Fireman's Fund has interpreted clause 17(a) to cover losses suffered from on deck stowage where there is an under deck bill of lading or a bill of lading not specifying stowage but the cargo is stowed on deck without the insured's consent. It applies 17(b), however, where the cargo is stowed on deck and there is an on deck bill of lading without regard to the insured's consent.

Robert Donovan, Fireman's Fund's Marine Secretary and senior underwriter in the midwest, whose department had responsibility for writing the Ingersoll policy, testifed that the contract terms of this insurance were not contained solely in the four corners of the policy. Donovan's initial reaction was that there should be coverage on the all risk policy. After he contacted John Stewart on the west coast and other senior Fireman's Fund officials, he changed his mind. Fireman's Fund officials seem to agree that the policy covers losses resulting from the insured's negligence since the policy was intended to cover fortuitous circumstances. While Robert Burke, Assistant Vice President and Nationwide Manager for Ocean Marine Claims, agreed that some negligence of the insured was covered, he was unable to define when such negligence was covered and when it was not.

II
Discussion

A. Bernard, Taiwan and Excellent Marine

There is no evidence that Malarski told anyone at Ingersoll that on deck shipment was to take place if the Bodena was booked. No booking notes were made by either Malarski or Larsen, and the various indications that

Larsen relied on to support his version of what he told Malarski were at best inconclusive. Taiwan discounts the evidence at trial that there were available stowage below the deck of the Bodena when Ingersoll's cargo was loaded on board. Taiwan argues that the evidence presented did not take into account access; that cargo must be stowed in relation to time and ports of discharge. While this is true, Taiwan has not shown that the available space evidenced at trial could not have been used for plaintiff's cargo because the cargo in that space would have to be discharged before the Bodena reached Pusan. More importantly, it has not established that when the vessel arrived at New Orleans, stowage below deck could not have been so organized that plaintiff's cargo could have been stowed pursuant to a rational discharge plan based on time and port of discharge.

Defendants, certainly Excellent Marine, Taiwan and Bernard, vehemently argue that Gryphon was Ingersoll's agent. The record, however, does not support that contention. Taiwan paid Gryphon a commission in connection with this transaction, while Ingersoll paid Gryphon nothing. That fact alone makes Gryphon more clearly Taiwan's agent than Ingersoll's. Gryphon contacted carriers servicing the Far East at Ingersoll's request for information on the availability of vessels to carry three shipments of machinery to the Far East. Malarski found out from Larsen that the Bodena was available in September, 1979. He told Larsen of Ingersoll's needs and was offered a commission if he succeeded in getting Ingersoll's business for Taiwan. Gryphon became Taiwan's agent, not Ingersoll's. In addition, the only authority Malarski had from Ingersoll was to secure the information Mellon asked for and report back.

A shipper's normal expectation on booking cargo for shipment is that it will be stowed below deck, unless the shipper expressly agrees to have the cargo stowed on

deck. *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 14 (2d Cir.1969), *cert. denied*, 397 U.S. 964, 90 S.Ct. 998, 25 L.Ed.2d 255 (1970). *Accord, Calmaquip Engineering West Hemisphere Corp. v. West Coast Carriers, Ltd.*, 650 F.2d 633, 639 (5th Cir.1981). Since this would be the normal expectation and custom and usage of the business, any deviation therefrom would have to be established by those claiming it. *St. John's N.F. Shipping Corp. v. S.A. Companhia Geral Commercial Do Rio De Janiero*, 263 U.S. 119, 124, 44 S.Ct. 30, 31, 68 L.Ed.201 (1924). Even proof that Malarski and Larsen agreed that the Ingersoll shipment was to go on deck would be insufficient to show that Ingersoll knew or agreed to on deck shipment prior to or at the time of the booking or loading of the cargo.

There is no evidence that Ingersoll specified below deck stowage either. Nor was the contention that Ingersoll always shipped below deck established. Indeed, the record shows that subsequent to this shipment, some Ingersoll machinery was carried on deck on another vessel. All of this beside the point, however, since our concern is only with the Bodena's voyage to Pusan, Korea, leaving New Orleans on September 27, 1979. As to that voyage there is no credible evidence that Ingersoll agreed to an on deck shipment. Stowage on deck is the unexpected, which the carrier cannot do without the express permission of the shipper. It clearly would make no sense for Ingersoll to expose its $2 million machinery to on deck shipment at its own risk.

Plaintiff engages in extensive discussions in its post trial brief of the validity under the maritime law of oral contracts of carriage and argues that the arrangements in this case were such. However, that question need not be explored in any depth. There is no dispute that a contract of carriage existed. Taiwan contends that there was an oral agreement to allow the Bodena to carry the cargo on

deck, and that such a contract was evidenced by the on deck at the shipper's risk bills of lading. Since Taiwan and anyone making that contention has the burden of proving such agreement, and Taiwan's proof does not meet that burden, we have a contract of carriage without evidence of any agreement by the shipper to allow the carrier to stow the cargo on deck.

Defendents argue that Mellon was present in New Orleans at the loading of the Ingersoll cargo on September 26 and 27. The evidence shows that Mellon was in New Orleans on September 21, but there is no evidence that he or any other Ingersoll representative was present when cargo was loaded on September 26 and 27.

The form of Bernard's advance notice would tend to give the recipient the idea that the notice contained all the vital information as it would appear on the bills of lading. Bernard seeks to discount Woywod's recollection of his September 26, 1979 conversation with Seipler to the effect that, except for the change of the port of discharge and shipping charges, the bills of lading would be the same as the advance notice, but it has the ring of truth. Nothing was ever said to Bernard or Seipler by Mid Gulf or Taiwan about on deck stowage of the Ingersoll machinery. Stowage is not usually specified on a clean bill of lading. Seipler had every reason to believe that the bills of lading, with the port of discharge corrected and the shipping charges added, would not differ from the advance notice. However, Woywod's failure to examine the bills of lading when he received them on October 1, 1979, cannot be justified on the basis of his September 26 conversation with Seipler. Ingersoll's apparent position that it had no knowledge that its machinery was carried on deck until the damage was discovered in Korea has no merit. It had constructive notice that its goods were being carried on deck at Ingersoll's risk on October 1, 1979, when the bills of lading were delivered to Woywod. The fact that he did not understand

the legal significance of the legend on the bills of lading is immaterial for the purpose of establishing when Ingersoll was on notice that its machinery was being shipped to Korea on deck and at its risk.

Bernard, Taiwan, and Excellent Marine spent an inordinate amount of time contending at trial and in their briefs that the bills of lading were clean. That argument is without merit and is wholly inconsistent with the purpose and meaning of a clean bill of lading.

Under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §1300 *et seq.*, a prima facie case of carrier liability is established by proof of delivery of the cargo to the carrier in good condition and discharge at destination in a damaged state. A clean on board bill of lading as a general rule satisfies the showing of good order at the time of shipment. *Emmco Insurance Co. v. Wallenius Caribbean Line, S.A.*, 492 F.2d 508, 513 (5th Cir.1974). The very purpose of clean on board bills of lading is to provide the shipper with documentation that the damage to his goods, if any occurs, cannot be attributed to him. In short, its purpose is to relieve the shipper of risk during the voyage. The bills of lading in this case maintain liability on Ingersoll throughout the voyage. Such bills cannot be clean. In any event, Judge Werker, who first handled this case in this court, and I have no trouble finding these bills of lading providing for on deck stowage at the shipper's risk unclean. As Judge Werker stated in disposing of the motions for summary judgment. "It long has been recognized that a clean bill of lading either is silent on the method of stowage, thereby portending that goods are to be stowed under deck, or does not specifically provide for on-deck stowage. There is no doubt that a reference to the poor condition of the cargo would make a bill of lading unclean. Even in the absence of such a reference, however, a . . . bill of lading that specifically calls for on-deck stowage is not clean." Memorandum Decision, June 23, 1983, slip op. at 6 (citations omitted).

Taiwan argues that since Woywod thought the bills of lading were clean, as did Bernard and Taiwan, there was a meeting of the minds and a valid bargain was struck. That argument makes no sense. Woywod may not have recognized a clean bill of lading when he saw one in 1979, but he asked in clear, unambiguous language for Bernard to supply clean bills of lading. Bernard and Taiwan are in the business of dealing with bills of lading constantly. Bernard held itself out as knowingh what a clean bill of lading was. At any rate, Bernard and Taiwan should have known what constitutes a clean bill. That they were ignorant in this regard will not suffice to free them from responsibility. Whatever Bernard's and Taiwan's view about on deck shipment being consonant with instructions top provide clean bills of lading, they had to know that shipper's risk notation rendered the bills of lading unclean.

Bernard argues that because it performed some but not all of the duties of a freight forwarder, it should not be held accountable for any damage to plaintiff's shipment. Bernard points out that it did not engage the Bodena, and it did not pick up the original bills of lading or deliver them to Ingersoll. That is beside the point. Bernard was engaged to secure clean on board bills of lading, and it failed to do so. Additionally, on receipt of the bills of lading on October 1, 1979, it failed to examine the copies it received and failed to advise Ingersoll that Taiwan had not followed instructions to issue clean bills of lading.

The testimony, which at trial and in its brief counsel for Bernard seek to distort, is that when Woywod spoke to Brokamp about obtaining the bills of lading more quickly than awaiting their delivery by mail to Rockford, Woywod decided that Ingersoll would pick up the documents directly on his own. That is not true. Brokamp suggested that Woywod pick the bills of lading from Gryphon in Chicago. The suggestion did not originate with Woywod. While there was no testimony to this effect, the court's surmise is

that Brokamp suggested Gryphon in Chicago rather than Bernard in Elk Grove Village, because Brokamp assumed that the mail from New Orleans would reach Gryphon's office in Chicago before it would reach Bernard's office in Elk Grove Village.

Bernard contends that Woywod's decision to secure the bills of lading directly from Gryphon rather than from Bernard relieved Bernard of any further responsibility. I disagree. Bernard was requested to secure clean on board bills of lading. It took on that assignment as Ingersoll's agent. Its responsibility included examining the issued bills of lading to determine whether they were in fact clean. Bernard failed to do that.

Plaintiff has introduced evidence tending to establish that Bernard did not have well trained or knowledgeable personnel but this, as with so much of the evidence and contentions in this case, constitutes gratuitous surplusage. Whether incompetence, sloth or lack of attention was the cause, Bernard did not perform its part of the bargain. That failure, for whatever reason, suffices to render Bernard liable.

Taiwan has failed to show that it put plaintiff's merchandise on deck with the latter's permission. The evidence discloses that Mid Gulf added the legend to the bill of lading without consultation with plaintiff or anyone authorized to act for the plaintiff. Under such circumstances, the bills of lading cannot be said to represent the contract of carriage between the parties.

Taiwan contends that Ingersoll's failure to act between October 1, 1979, when it received the bills of lading and October 14, 1979, when it could have intercepted the vessel and off shored the merchandise before the Bodena left United States ports, should be construed as acceptance of its unilateral act. That contention is rejected.

The record indicates that Ingersoll was of the impression that the Bodena was proceeding directly from New

Orleans to Korea. By checking shipping information, plaintiff could have discovered that the Bodena was scheduled to stop at various United States ports before proceeding to Korea. Plaintiff, however, should not be penalized for failure to take such steps when the carrier acts unlawfully and unilaterally in stowing the cargo on deck and, contrary to the shipper's instructions, issued unclean on deck at the shipper's risk bills of lading. While the off shoring of the merchandise at some United States port is presented as an option plaintiff failed to exercise, there was no evidence to show the consequences of such a course of action. Could plaintiff have readily secured space on another vessel bound for Pusan? When was such passage available? What costs would plaintiff have had to incur to exercise that option? The court cannot determine from the dearth of evidence on the issue that off shoring was a real option that could have been exercised. The burden was on defendants to establish that such a real option existed.

Bernard for the first time asserts in its post trial brief in chief (pp. 3-8) that the court lacks subject matter jurisdiction because Ingersoll's claims as to Bernard do not come within the admiralty jurisdiction of the court. Federal courts have traditionally exercised admiralty jurisdiction over shipper's claims against freight forwarders. *See, e.g., Reid v. Fargo*, 241 U.S. 544, 545-46, 36 S.Ct. 712, 713, 60 L.Ed. 1156 (1916); *The Cayo Mambi*, 1 F.Supp. 116, 117 (E.D.N.Y.1932), *aff'd*, 62 F.2d 791 (2d Cir.1933); *A.P. Moller Steamship Co. v. Bromhead & Dennison, Ltd.*, 1982 AMC 1455 (S.D.Tex.1981). *See also A. Murr, Export/Import Traffic Management and Forwarding* 49 (6th ed. 1979) (federal district courts have original jurisdiction in admiralty in practically all civil and/or criminal actions brought by, or against, foreign freight forwarders).

The cases cited by Bernard are distinguishable. *Maher v. Newtown Creek Towing Co.*, 190 F.Supp. 933 (S.D.N.Y.1961) (Weinfeld, J.), involved the question of

jurisdiction under general maritime law of a cause of action asserted against a non-diversity defendant by virtue of its joinder with the Jones Act. *P.D. Marchessini & Co. v. Pacific Marine Corp.*, 227 F.Supp. 17, 18 (S.D.N.Y.1964) (Weinfeld, J.), involved "preliminary service leading to maritime contract." The same is true of *The Thames*, 10 F. 848 (S.D.N.Y.1891) (Brown, J.), and of *The Harvey and Henry*, 86 F. 656, 658 (2d Cir.1898). *David Crystal, Inc. v. Cunard Steamship Co.*, 223 F.Supp. 273, 293 (S.D.N.Y.1963) (Levet, J.), *aff'd*, 339 F.2d 295 (2d Cir.1964), *cert. denied*, 380 U.S. 976, 85 S.Ct. 1339, 14 L.Ed.2d 271 (1965), involved services performed after the voyage had been completed. In this case, the services Bernard performed were not preliminary or rendered after completion of the voyage.

"The character of the work is determinative of the question whether the agreement was maritime and the jurisdiction properly laid in admiralty." *The Hinkins Steamship Agency v. Freighters, Inc.*, 498 F.2d 411, 412 (9th Cir.1974). Services such a "supervising dockage, pilotage, tug assisting . . . cleaning of holds . . . and handling operating details pertaining to the vessel's call [at a port of discharge]" were held to be "clearly maritime in nature." *Id.* Preparation and processing the bill of lading, the export declarations and payment of the ocean freight "were clearly maritime and necessary" for the shipment by ocean voyage to Korea. *Id.* Moreover, as the court stated in the above case referring to authorities, at least one of which Bernard relies on, "[u]nder more modern decisions, appellant's cases are of doubtful validity." *Id.* The jurisdictional contention has no merit.

Nor does the argument that the small print on Bernard's invoice to Ingersoll, dated September 28, 1979, operates to limit Bernard's liability to $50. This invoice was received by Ingersoll on October 4, 1979. This was after the Bodena had sailed with Ingersoll's cargo improp-

erly stowed. A post hoc presentation containing a clause unilaterally purporting to indemnify one of the parties against liability does not operate to modify the original agreement unless the terms are agreed to by the other party and consideration therefor received. *Tanker & Tramps Corp. v. Tugs Jane McAllister and Margaret M. McAllister*, 358 F.2d 896, 899-900 (2d Cir. 1966). The argument that the invoice complied with custom and usage also has no merit. There was no evidence at trial that use of the invoice with the limitation clause was such as to establish it as custom and usage of the trade. *Tankers & Tramps Corp. v. Tugs Jane McAllister and Margaret M. McAllister, supra*, at 899 (there must be evidence presented to establish sufficient frequency of use of the restrictive clause to warrant a finding of custom and usage).

While a clean on board bill of lading always establishes that unpackaged goods were in good order at the time of shipment, *Emmco Insurance Co. v. Wallenius Caribbean Line, S.A., supra*, when the goods are packaged such clean bills of lading merely attest to the apparent good condition of the cargo based on external inspection. *See, e.g., Vana Trading Co. Inc. v. S.S. Mette Skow*, 556 F.2d 100 (2d Cir.1977); *Midwest Nut and Seed Co., Inc. v. S.S. Great Republic*, 1979 AMC 379, 383-84 (S.D.N.Y.1978) (Carter, J.), cited with approval in *Caemint Food Inc. v. Brasileiro*, 647 F.2d 347, 353 and n. 5 (2d Cir.1981). Where a hidden vice or defect may be the cause of cargo damage, the shipper must establish that the goods were delivered in good condition. *See Midwest Nut & Seed Company, Inc. v. S.S. Great Republic, supra.* There is no evidence that the Ingersoll cargo had a hidden defect or was delivered to the Bodena in a rusted or deteriorated condition. Nor is there any credible evidence that the machinery was inadequately or carelessly packed. The testimony was that the packing and crating, except for one item, was done at Rockford, and that the machinery was packaged in Ingersoll's customary manner. That the packaging did not withstand exposure

to turbulence and storms to which the machinery and its packaging were exposed on open deck is not proof of negligent or improper packaging by Ingersoll. The evidence is clear that the rust which afflicted the machinery stowed on the deck of the Bodena was not present in the three crates stowed below deck.

Plaintiff has established that the rust damage to the machinery resulted from exposure on deck to sea water, and has met its burden of showing that the rust did not result from exposure in Korea. The rust was the result of sea water and condensation. The cargo on deck was exposed to heavy storms and wind turbulence. There is no credible evidence that the rusting was present before loading of the cargo at New Orleans, or that the rusting did not occur until after discharge at Pusan or that there was any material additional rusting while the cargo was in Korea. The court is satisfied that the rusting to the on deck cargo resulted from the Bodena sailing through a turbulent ocean and several severe storms.

Both Taiwan and Bernard are held liable jointly and severally in full to Ingersoll for damages it suffered in respect to SO 24441.

I cannot see any liability, however, on the part of Excellent Marine. It owns the Bodena, but control of the vessel in regard to making a contract of carriage of cargo was in Taiwan's hands under a time charter. The master of the Bodena and the crew were under Excellent Marine's control. The form of the bills of lading was the responsibility of Taiwan. The master accepted the bills of lading as presented. He did not authorize or require that they be issued under his authority. I see no connection whatsoever between Excellent Marine and plaintiff for the purpose of holding Excellent Marine liable for any damages to Ingersoll's cargo.

Plaintiff sought to establish that the crew was incompetent and negligent in the handling of the ship so as to

render the Bodena unseaworthy. The court is not persuaded. The claims against Excellent Marine are dismissed.

B. Fireman's Fund

Fireman's Fund seems to argue that the burden is on plaintiff in respect of this all risk insurance policy to establish that its loss resulted from an insured peril. This is so, it contends, because Fireman's Fund is not arguing "an exclusion or exception 'all risk' coverages. Rather it is the very question of whether 'all risks' or 'limited risk' coverage is afforded this loss which is at issue. Hence the burden remains on Ingersoll to prove that this loss resulted from an insured peril." Fireman's Fund Post Trial Brief at 9. That convoluted statement can only mean precisely what Fireman's Fund says it does not mean, i.e. that this loss is excluded or excepted from "all risk" coverage.

The rule as I understand it, is that an all risk policy places the burden on the insured to establish only the existence of the all risk policy and its loss. Then the burden shifts to the insurer to show that the coverage of the loss comes within one of the exceptions. *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*, 505 F.2d 989, 999 (2d Cir.1974). Fireman's Fund argues that the loss is covered by clause 17(b) which would mean no coverage on a partial loss and a limit of $175,000 recovery as per clause 8(B)(2) of the policy in any event. Under *Pan American* and cognate cases, Fireman's Fund has the burden to establish that clause 17(b) is applicable, that its exception or exclusion applies. *See also Holiday Inns, Inc. v. Aetna Insurance Co.*, 571 F.Supp. 1460, 463-64 (S.D.N.Y.1983) (Haight, J.); *Redna Marine Corp. v. Poland*, 46 F.R.D.81, 86 (S.D.N.Y.1969) (Mansfield, J.). Ingersoll has made out a prima facie case by establishing that it is the insured under the policy with its all risks provisions and that it suffered a loss of cargo.

In construing the policy, the court is to be guided by federal admiralty law where there is an established rule.

federal admiralty law where there is an established rule. *Walter v. Marine Office of America*, 537 F.2d 89, 94, *reh. denied*, 542 F.2d 1174 (5th Cir.1976). Only in the absence of established federal rules will state law govern. *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 316, 75 S.Ct. 368, 371, 99 L.Ed. 337 *reh. denied*, 349 U.S. 907, 75 S.Ct. 575, 99 L.Ed. 1243 (1955). In that regard in applying New York's choice of law tenets, the law of the state having the most contacts and interest in the controversy, would govern. *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*, 37 N.Y.2d 220, 371 N.Y.S.2d 892, 333 N.E.2d 168 (1975), *cert. denied*, 423 U.S. 866, 96 S.Ct. 126, 46 L.Ed.2d 95 (1975). Both California and Illinois would seem to qualify as the state with the greatest interest: California because it is the state where Fireman's Fund has its principal place of business; and Illinois because of its interest in having citizens and residents of the state collect what is due them from out of state insurance companies. I believe New York courts would find Illinois has the greatest interest in this controversy. The issue, however, seems academic since on matters material to determination of this controversy, federal maritime law is firmly established, and Illinois law appears to be consistent with federal law.

A marine insurance policy, as well as other types of insurance policies, is to be liberally construed in favor of the insured. *Kalmbach, Inc. v. Insurance Co. of the State of Pennsylvania*, 529 F.2d 552, 555 (9th Cir.1976); *Fogelmark v. Western Casualty & Surety Co.*, 11 Ill.App.2d 551, 556, 137 N.E.2d 879, 882 (1956). Where the terms are clear and unambiguous, they are given appropriate effect. *United States Fire Ins. Co. v. Schnackenberg*, 88 Ill.2d 1, 4, 57 Ill.Dec. 840, 842, 429 N.E.2d 1203, 1205 (1981); *Zipf v. Allstate Insurance Co.*, 514 Ill.App.3d 103, 11 Ill.Dec. 798, 369 N.E.2d 252 (1977).

The language in the policy originated with Fireman's

Fund. Therefore, if the provisions are ambiguous or equivocal, they must be construed "most favorably to the insured and most strictly against the insurer." *Index Fund, Inc. v. Insurance Co. of North America*, 580 F.2d 1158, 1162 (2d Cir.1978), *cert. denied* 440 U.S. 912, 99 S.Ct. 1226, 59 L.Ed.2d 461 (1979), cited with approval in *Vargas v. Insurance Co. of North America*, 651 F.2d 838, 839-40 (2d Cir.1981).

Continuing at 840, the *Vargas* court said: "The insurer bears a heavy burden of proof, for it must ' "establish that the words and expressions used [in the insurance policy] *not only are susceptible of the construction sought by [the insurer] but that it is the only construction which may be placed on them.*" ' *Filor, Bullared & Smyth v. Insurance Co. of North America*, 605 F.2d 598, 602 (2d Cir.1978), *cert. denied*, 440 U.S. 962 [99 S.Ct. 1506, 59 L.Ed.2d 776] (1979) (quoting *Lachs v. Fidelity & Casualty Co. of New York*, 306 N.Y. 357, 365-66, 118 [118 N.E.2d 555] (1954)). The insurer is 'obliged to show (1) that it would be unreasonable for the average man reading the policy to [construe it as the insured does] and (2) that its own construction was the only one that fairly could be placed on the policy.' *Sincoff v. Liberty Mutual Fire Insurance Co.*, 11 N.Y.2d 386, 390, 230 N.Y.S.2d 13, 16, 183 N.E. 899, 901 (1962). Thus the question in this case is narrow: is the insurer's interpretation of the contract the only reasonable and fair construction as a matter of law?" (Emphasis in the original.)

There is no mention of bills of lading in clause 17(a) or 17(b) of the insurance policy. They speak of under deck and on deck shipments. The officials of Fireman's Fund testified that Ingersoll's failure to realize or its slowness in realizing that it had an on deck bill of lading caused Fireman's Fund no prejudice. Although Burke did testify that if he found that a shipper has been issued an on deck bill of lading after the vessel sailed and the insured had diligently

done all it could, he might find coverage. I do not understand why this situation does not meet that criterion. On the one hand, he, Donovan and Stanley Krasula, Claims Manager of the Ocean Marine Claims Department, seem to view the bill of lading as controlling without regard to the fact that the shipper was not at fault. On the other hand Burke sometimes seems to be saying that other factors might govern. In any event, the policy has been rendered ambiguous by the gloss Fireman's Fund has engrafted on 17(a) and 17(b).

Fireman's Fund officials accepted Ingersoll's version of the events that it booked an under deck shipment and on deck stowage was unauthorized. If under deck shipments in clause 17(a) to which full coverage is accorded the insureds means on deck shipments without the insured's assent with under deck bills of lading, it also can be reasonably read to cover on deck shipments without the insured's assent with on deck bills of lading issued contrary to its instructions. It was agreed that Fireman's Fund's interpretation of clauses 17(a) and (b) requires one to go beyond the words in the clauses. The interpretation Fireman's Fund has adopted is not written in the policy itself, nor in any interpretive Fireman's Fund manual or document. It was decided upon apparently *ad hoc*, among Burke, Stewart, Donovan and Krasula to deal with this unusual situation.

The reason for not applying clause 17(b) to on deck cargo with an under deck bill of lading was explained by Burke as based on equitable considerations. Even though the cargo is physically on deck, "there was a contract for it to go under deck." That the cargo is on deck he regarded as fortuitous. The same analysis justifies 17(a) coverage to cargo which it placed on deck with an on deck bill of lading without the owner's consent. In these circumstances the contract is for under deck carriage. The circumstances to the shipper are just as fortuitous in the one case as in the other.

Fireman's Fund sought to justify the interpretation given the court on the basis of their and Ingersoll's understanding of what the policy meant. But the interpretations offered constituted the subjective views of Fireman's Fund officials, never communicated to Ingersoll until this litigation. The proffered explanation of the policy's meaning, therefore, cannot be used to establish that Fireman's Fund and Ingersoll had such intent and understanding when they entered into the insurance contract. *Lubrication Maintenance, Inc. v. Union Resource Co., Inc.*, 522 F.Supp. 1078, 1081 (S.D.N.Y.1981)(Weinfeld, J).

This is an all risks policy which covers "all losses that are fortuitous no matter what caused the loss." *Goodman v. Fireman's Fund Insurance Co.*, 600 F.2d 1040, 1042 (4th Cir.1979). A loss is not fortuitous "only if it results from an inherent defect, ordinary wear and tear or from the intentional misconduct of the insured." *Id.* Fireman's Fund officials conceded that the insured's negligence was considered a fortuitous event. Burke sought to limit this to certain circumstances, but he could not give any clear parameters as to what negligent circumstances, were fortuitous and those that were not. According to him the question had to be decided on a case by case basis. This approach is not appropriate. The meaning of an insured's negligence as embraced within fortuity must be clear to both the insured and the insurer. The carrier here breached the contract of carriage by placing the cargo on deck, and the loss to Ingersoll necessarily became fortuitous.

The explanations given by Fireman's Fund seems contrived, concocted solely to keep from paying up to $2.5 million which was the extent of Ingersoll's coverage under this policy. Because the policy covered fortuitous circumstances, officials at Fireman's Fund must have realized that without the gloss of the under deck bills of lading engrafted on 17(a), that the phrase under deck shipments had to embrace on deck shipments without the shipper's

strained interpretation of 17(a) to cover only under deck bills of lading no matter where the cargo was physically stowed, Fireman's Fund official sought to defeat Ingersoll's legitimate claims. This has caused Ingersoll to have to undertake the cost of suing all other parties involved–a task which more properly should be assumed by the insurance company after having paid Ingersoll's claim.

There was conflicting testimony among the officials concerning the basis for denying coverage, and Donovan and Burke's deposition testimony was in direct conflict with critical statements they made on the witness stand. Thus, in depositions Burke and Donovan would appear to take one position which each would alter, modify or contradict at trial. These conflicts and inconsistencies helped convince the court that Fireman's Fund had conjured up its strained reading of the insurance policy solely in an effort to avoid accepting the liability the policy imposed.

Plaintiff's pursuit of the other defendants for the damage sustained was a direct and forseeable consequence of the Fireman's Fund breach. *Mitsui v. American Export Lines*, 636 F.2d 807, 824 (2d Cir.1981). Hence the litigation expenses Ingersoll incurred are recoverable. *Artvale Inc. v. Rugby Fabrics Corp.*, 232 F.Supp. 814, 826 (S.D.N.Y.1964) (Levet, J.), *aff'd*, 363 F.2d 1002 (2d Cir.1966).

Plaintiff also relies on clause 25 of the policy as requiring Fireman's Fund to reimburse plaintiff for all the litigation costs it has incurred. That clause provides:

> In case of any loss or misfortune, it shall be lawful and necessary for the Assured, his or their factors, servants and assigns, to sue, labor and travel for, in and about the defense, safeguard, and recovery of the aforesaid subject matter of this insurance, or any part, thereof, without prejudice to this insurance, the charges whereof this Company shall bear in proposition to the sum hereby insured.

That clause, however, seems principally invoked to

That clause, however, seems principally invoked to obtain reimbursement for those expenses incurred in an effort to mitigate damages, *see, e.g., Blasser Brothers Inc. v. Northern Panamanian Line*, 628 F.2d 376, 378 (5th Cir.1980), and has no application to plaintiff's litigation and attorneys' fees claims here.

As a rule attorneys' fees are awarded in maritime cases in order to make the insured whole, *Hamilton v. Canal Barge Co.*, 395 F.Supp. 978, 990 (E.D.La. 1975), and attorneys' fees are recoverable in this instant case in view of the fact that plaintiff's recovery against Fireman's Fund will be reduced by whatever the former recovers from the other defendants. However, the reduction of Fireman's Fund's liability to plaintiff is the net of such recovery, less Ingersoll's expenses incurred in prosecuting this litigation. Those expenses necessarily embrace attorneys' fees. *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1073 n. 7 (5th Cir.1970); *Baier v. State Farm Insurance Co.*, 28 Ill.App.3d 917, 329 N.E.2d 543 (1st Dist.1975), *aff'd* 66 Ill.2d 119, 5 Ill.Dec. 572, 361 N.E.2d 1100 (1977).

In light of the purpose in awarding attorneys' fees in admiralty case, *see Mitsui & Co., Ltd. v. American Export Lines, supra; Artvale, Inc. v. Rugby Fabric Corp., supra*, the limitation of $5,000 argued for by Fireman's Fund as being required under Illinois law, Fireman's Fund Post Trial Brief at 71, has no application to this case. The award of attorneys' fees is in keeping with the admiralty rule which is to make the aggrieved party whole. *See Mitsui & Co., Ltd. v. American Export Lines, supra; Artvale, Inc. v. Rugby Fabric Corp., supra.*

Within one month of the issuance of this opinion, counsel for Ingersoll is to submit evidence of the litigation expenses it incurred in this case. These expenses should be shown by affidavits, time sheets and other data pertinent to the matter, with a memorandum supporting recovery for what is claimed. Fireman's Fund should file its oppos-

ing papers three weeks after plaintiff's submission. The court will determine the matter on such submissions or, if deemed necessary, set a hearing prior to making a final decision.

No other punitive award will be made. While defendant should have paid plaintiff under clause 17(a), its action in refusing to do so awaiting the outcome of this litigation does not constitute such egregious conduct to warrant an award of punitive damages other than attorneys' fees and litigation expenses, in addition to compensatory damages.

C. Damages

Plaintiff's damages are the costs incurred in repair to the machinery. To these costs a claimed 43% is added for overhead expenses and profits. While overhead costs and profits are legitimate items, the markup plaintiff seeks is not warranted.

Plaintiff seeks $1,149,647.57 for the costs of repair of the rusted machine, plus $90,969.65 for delay in contract payments by Hyundai caused by the damage and necessary repairs.

There is no dispute as to $153,818.10 for freight and insurance charges. There is no dispute as to the $70,337 C & F cost for transporting the repaired machine from Germany to Korea. Those items, therefore, are allowed. The other items are disputed.

There is resistance to the claim of $90,969.65 for interest for delay in receiving payment from Hyundai for the machine. This is a legitimate item. The interest is calculated from the date payment is due to the date payment is received. Interest is calculated daily and averages about 12%. Interest calculated at the market rates for this item is appropriate. *Black Sea & Baltic Insurance Co., Ltd. v. S.S. Hellenic Destiny*, 575 F.Supp. 685, 695 (S.D.N.Y. 1983) (Lasker, J.). During the period required for repair plain-

tiff lost use of the funds which it would have otherwise received. Accordingly, $90,670.00 is allowed (I am only calculating to the nearest whole dollar figure).

For items bought and for labor costs, plaintiff seeks an extremely liberal markup for overhead expenses and profits. The court sees no justification for any markup being added to the cost for parts taken from Ingersoll-Rockford inventory or purchased by it. These items listed as $9,532 and $18,471 are allowed without markup. Labor costs for parts built by Ingersoll-Rockford are arrived at by computing the basic cost of labor which is $6,713.73, adding overhead costs in excess of 30% and then applying a 40% profit. That seems excessive. A markup of 40% should be adequate to cover overhead and profits on this item. Accordingly, $30,853.00 is allowed. Reimbursements including salaries of $46,635 and $32,000 are allowed. Total repair and repackaging costs of $525,284 are allowed. Overhead and profits have been included in this figure. Thus the total allowed for damages for repair, repackaging and delivery of the machine to Korea is $977,899.

Prejudgment interest in admiralty cases is to be granted in the discretion of the trial court and "should be granted in the absence of extraordinary circumstances." *Mitsui & Co., Ltd. v. American Export Lines*, 636 F.2d 807, 823 (2d Cir.1981). The latest case in this circuit to deal with the subject, *In the Matter of the Complaint of Rio Grande Transport, Inc. v. Rio Grande Transport and Embarsay of Tunisia*, 770 F.2d 262 (2nd Cir.1985), reached the same conclusion. As I read this rule, prejudgment interest must be allowed unless good cause warrants denial. To do otherwise would constitute an abuse of discretion. *Socony Mobil Oil Co. v. Texas Coastal and International, Inc.*, 559 F.2d 1008, 1014 (5th Cir.1977).

The rate of interest rests in the court's broad discretion, *Independent bulk Transport, Inc. v. The Vessel "Morania Abaco"*, 676 F.2d 23, 27 (2d Cir.1982). Plaintiff

"is entitled to income which the monetary damages would have earned and that should be measured by interest on short term risk free obligations." *Id.* In this circumstance plaintiff has lost income that would have been made on money spent to make these repairs. Thus interest should run "from date repairs were paid for until the date of reimbursement". *Id.*, (Newman, J., concurring). The interest rate to be applied is the rate associated with federal paper as found in the Federal Reserve Bulletin covering the time in question.

The parties are to calculate prejudgment interest under this formula and submit same in plaintiff's proposed final order and in defendants' proposed counter orders.

Judgment is awarded against Taiwan, Bernard and Fireman's Fund jointly and severally in the amount of $977,899, plus prejudgment interest pursuant to the formula outlined in this memorandum. In addition, judgment is awarded against Fireman's Fund in the amount of plaintiff's litigation expenses and attorneys' fees. Plaintiff is to recover its costs.

IT IS SO ORDERED.

No. 87-897

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

J.E. BERNARD & CO.,

Petitioner,

v.

THE INGERSOLL MILLING MACHINE COMPANY, M/V BODENA, her engines, boilers, etc., EXCELLENT MARINE, INC., TAIWAN INTERNATIONAL LINE LIMITED and FIREMAN'S FUND INSURANCE CO.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE INGERSOLL MILLING MACHINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the courts below were erroneous in finding that petitioner Bernard provided freight forwarding services to the shipper and the ocean carrier that were maritime in character and essential to the ocean shipment of goods, and thus concluding that the freight forwarding contract was within the scope of admiralty jurisdiction?

2. Whether this Court should reach the issue of admiralty jurisdiction where there is also diversity jurisdiction and pendant party jurisdiction?

3. Whether the lower courts erred in concluding that as a matter of law or of fact an "on deck shipper's risk" bill of lading is not clean.

RULE 28.1 STATEMENT

Respondent The Ingersoll Milling Machine Company is a wholly owned subsidiary of Ingersoll International, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
RULE 28.1 STATEMENT	ii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. The Second Circuit's Decision is Based on an Analysis of the Maritime, Non-preliminary Character of Bernard's Work in Light of the Factual Record. It Did Not Expand the Principles of Admiralty Jurisdiction	4
II. This Case Is Not An Appropriate One For The Review Of The Principles Of Admiralty Jurisdiction, Because There Also Was Diversity and Pendant Party Jurisdiction	7
A. Diversity Jurisdiction	7
B. Pendant Party Jurisdiction	9
III. As A Matter Of Law And Of Fact, The Bill Of Lading Was Not Clean	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases: PAGE

Aldinger v. Howard, 427 U.S. 1 (1976) 10

Astor-Honor, Inc. v. Grosset & Dunlap, Inc., 441 F.2d 627 (2d Cir. 1971) 9

Boudreaux v. Puckett, 611 F.2d 1028 (5th Cir. 1980) ... 11

Calmaquip Eng. West Hemisphere Corp. v. West Coast Carrier's Ltd., 650 F.2d 633 (5th Cir. 1981) 12

DeBellas v. United States, 542 F. Supp. 999 (S.D.N.Y. 1982) 10

The Delaware, 81 U.S. (14 Wall) 579 (1874) 12

E.S. Binnings, Inc. v. M/V Saudi Riyadh, 815 F.2d 660 (11th Cir. 1987) 4, 6, 7

Hinkens Steamship Agency, Inc. v. Freighters, Inc., 498 F.2d 411 (9th Cir. 1974) 7

Hipp v. United States, 313 F. Supp. 1152 (E.D.N.Y. 1970) 9

The Idefjord, 114 F.2d 262 (2d Cir.), *cert. denied*, 311 U.S. 707 (1940) 12

Insurance Co. v. Dunham, 78 U.S. (11 Wall) 1 (1871) .. 5

Kossick v. United Fruit Co., 365 U.S. 731 (1961) 5

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971) 9, 10, 11

Lykins v. Pointer, 725 F.2d 645 (11th Cir. 1984) 11

Maltais v. United States, 439 F. Supp. 540 (N.D.N.Y. 1977) 9

Massachusetts v. Westcott, 431 U.S. 322 (1977) 7

PAGE

Minturn v. Maynard, 58 U.S. (17 How.) 477 (1855). . . .4, 5, 7

Moor v. County of Alameda, 411 U.S. 693 (1973) 9

Morse Electro Products Corp. v. S.S. Great Pearce, 437 F. Supp. 474 (D.N.J. 1977) 10, 11

Ortiz v. United States, 595 F.2d 65 (1st Cir. 1979) 11

Owen Equipment and Erection Company v. Kroger, 437 U.S. 365 (1978). 10

Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp., 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985). 5, 7

Reid v. Fargo, 241 U.S. 544 (1916) 6

St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial Do Rio De Janeiro, 263 U.S. 119 (1923) 12

The Thames, 10 F. 848 (S.D.N.Y. 1881) 5

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) 9

Rules And Statutes:

28 U.S.C. § 1332(c) 8

28 U.S.C. § 1333 10

42 U.S.C. § 1983 10

46 U.S.C. § 801 6

46 U.S.C. § 841b(a). 6

46 C.F.R. Part 510. 6

Fed. R. Civ. P.
Rule 38(d) 11
Rule 39(b) 11

Fed. R. Evid., Rule 201(f) 7

PAGE

Miscellaneous:

Merchant Marine Officer's Handbook, pp. 18-26 (4th ed. 1965) 12

U.S. Code Cong. & Ad. News, pp. 2699, 2702, 2704... 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-897

J.E. BERNARD & CO.,

Petitioner,

v.

THE INGERSOLL MILLING MACHINE COMPANY, M/V BODENA, her engines, boilers, etc., EXCELLENT MARINE, INC., TAIWAN INTERNATIONAL LINE LIMITED and FIREMAN'S FUND INSURANCE CO.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT THE INGERSOLL MILLING MACHINE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent the Ingersoll Milling Machine Company respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Opinion of the United States Court of Appeals for the Second Circuit in this case. That opinion is reported at 829 F.2d 293 (2d Cir. 1986), and is reprinted in Petitioner's Appendix at 1a ("Pet. App. ___"). The District Court opinion is reported at 619 F. Supp. 493 (S.D.N.Y. 1985), and is reprinted in Petitioner's Appendix at 38a.

STATEMENT OF THE CASE

In August 1979, respondent The Ingersoll Milling Machine Company ("Ingersoll"), Rockford, Illinois, booked cargo with Taiwan International Line ("Taiwan") through Taiwan's Illinois agent for shipment from New Orleans to Korea. The cargo consisted of a $2.1 million special design metal working milling machine.

The District Court found that Ingersoll and Taiwan entered an oral contract of carriage for under deck stowage. (Pet. App. 49a). Although Ingersoll never gave permission for on deck stowage, seventeen of the twenty boxes were stowed on deck and were severely damaged by corrosion on arrival in Korea.

Ingersoll retained petitioner J.E. Bernard & Co. ("Bernard") to act as the freight forwarder for this shipment and instructed it to perform certain tasks relating to the voyage. The District Court found that Bernard was engaged to secure clean bills of lading and to see that Taiwan followed instructions to issue clean bills of lading. (Pet. App. 51a). Bernard was also engaged to ensure that Ingersoll's cargo would be properly loaded so that proper bills would be issued. (Pet. App. 17a). See JA 518-27, 560.[1]

Without Ingersoll's knowledge, Taiwan's agent in New Orleans marked the bills of lading "on deck shipper's risk." The courts below found that such a bill of lading is not clean. (Pet. App. 18a-19a, 50a-51a). After the ship sailed, Bernard received the bill of lading but failed to examine its copies and failed to advise Ingersoll that Taiwan had not followed instructions to issue clean bills of lading. (Pet. App. 16a-17a, 20a-21a).

As the freight forwarder on Ingersoll's shipment, Bernard performed many tasks before and after the voyage began which were essential to completion of the safe ocean voyage of

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1 "JA" refers to the Joint Appendix filed in the Court of Appeals. "E" refers to the Exhibit volume thereof. "PX" refers to Plaintiff's Trial Exhibits.

Ingersoll's cargo. Its representative in the loading port arranged for necessary documentation to be prepared for acceptance of the cargo at the pier and coordinated the movement of Ingersoll's cargo to the pier. It also verified the loading of the cargo on the ship. JA 518-27, 560-61.

Bernard was responsible for preparing, securing and reviewing properly executed shipping documents, including the bill of lading. JA 459, 464, 488-90, 492-93, 496, 498, 506, 560-65. Bernard also paid the freight for Ingersoll, E 428, and billed Ingersoll for preparation of the bill of lading and forwarding. E 534. The Court of Appeals found that the procurement of these documents relating to a shipment by sea was "an essential and integral part of the shipping process." (Pet. App. 16a).

Furthermore, Bernard performed some tasks for the carrier. Thus, in order to receive its commission from Taiwan, Bernard certified to Taiwan that it had performed "the solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for, space for such cargo," and

> "(1) The coordination of movement of the cargo to shipside; (2) The preparation and processing of the ocean bill of lading; (3) The preparation of dock receipts or delivery orders; (4) The preparation and processing of consular documents or export declarations; (5) the payment of the ocean freight charges on the cargo." PX 124.

As a result of Bernard's breach of its contract, the cargo travelled on deck and was badly damaged. (Pet. App. 20a-21a). Bernard did not provide the safe voyage which it had promised to help secure.

In July 1980, Ingersoll filed suit against Bernard, Taiwan, and Fireman's Fund Insurance Co. (its own insurance carrier) in the Northern District of Illinois, on the basis of admiralty jurisdiction. The suit was later transferred to the Southern District of New York and consolidated for trial with Ingersoll's suit against Taiwan and Excellent Marine Inc., the vessel's owner. Bernard and Taiwan cross-claimed against one another.

Although Bernard moved for summary judgment on the basis of the bills of lading, it never moved to challenge the jurisdiction of the Court or to request a jury trial. Rather, it questioned subject matter jurisdiction for the first time in its post-trial brief.

The District Court rejected Bernard's belated challenge to its jurisdiction and its argument that Bernard's work had been performed only preliminary to or after the completion of the voyage. It found Bernard's actions in preparing and processing the bill of lading and other vital documents and in paying the ocean freight were maritime in character and necessary for the shipment to Korea. (Pet. App. 54a).

The Second Circuit also rejected Bernard's jurisdictional challenge. It affirmed the District Court's finding that Bernard's work was of a non-preliminary nature, and that the tasks which Bernard agreed to perform were maritime in nature and essential to the voyage. Accordingly, it held that there was admiralty jurisdiction. (Pet. App. 16a-17a).

The lower courts also considered all of the relevant evidence offered by both sides on the subject of clean bills of lading, and rejected Bernard's claim that as a matter of law a bill of lading marked "on desk shipper's risk" is a clean bill of lading.

The Second Circuit denied Bernard's petition for rehearing with a request for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

I. The Second Circuit's Decision Is Based on an Analysis of the Maritime, Non-preliminary Character of Bernard's Work in Light of the Factual Record. It Did Not Expand the Principles of Admiralty Jurisdiction.

Petitioner contends that the Second Circuit's decision below conflicts with the rule of *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), that general agency contracts are not recognizable in admiralty, with a decision of the Eleventh Circuit in *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 669 (11th

Cir. 1987), and with its own decision in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985).

To the contrary, the Second Circuit carefully considered and followed *Minturn* in its factual analysis of Bernard's activities. The evidence showed, and the Court found, that Bernard's contract was not that of a general agent and that its duties were not preliminary or incidental to the ocean carriage of Ingersoll's cargo. We believe that these findings that the Second Circuit affirmed were correct.

Minturn involved a general agent's demand against its principal for a balance of accounts. The agent sought payment for money for husbanding services provided to the shipowner in paying for supplies, repairs and similar charges for the vessel. The Second Circuit did not vary from or expand *Minturn*, because Ingersoll's contract with Bernard was plainly not a general agency contract for husbanding services to a vessel, or even a general agency contract of any type.[2]

To the contrary, Bernard contracted to and did provide essential services to the shipper related to a specific ocean voyage. It coordinated the movement of cargo to the ship, had a representative in the loading port, provided key documents for the voyage, verified that the cargo was loaded, reviewed the documents after sailing and paid the freight.

Bernard argues that its services were "shoreside," and incidental or preliminary to the voyage. Bernard implies (Pet. 6), as it argued below in reliance on *The Thames*, 10 F. 848 (S.D.N.Y. 1881), that "shoreside" work is not maritime. This Court has long ago rejected the "locality test" for maritime contracts. *Insurance Co. v. Dunham*, 78 U.S. (11 Wall) 1, 26 (1871). The boundaries of admiralty jurisdiction are conceptual. *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961).

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2 Bernard did not argue below and does not actually contend here that it had a general agency contract with Ingersoll. This is for good reason, since in order to avoid liability, Bernard has consistently argued that its contractual tasks were *de minimis*, and that it was little more than a messenger.

The Second Circuit properly focused on the character of the work as determinative, and on this factual record properly concluded that Bernard's work was essential to the ocean voyage of Ingersoll's cargo and therefore maritime.[3]

Bernard paid the ocean freight. Bernard was charged with procuring *clean* ocean bills of lading, doing whatever was necessary after the vessel sailed to review them and advising Ingersoll appropriately. Bernard was not a mere messenger. It had an affirmative obligation to secure for Ingersoll clean bills. It undertook this obligation for Ingersoll, an inland shipper, in order to insure that Ingersoll's cargo was actually and properly loaded on the vessel and that it would experience a safe ocean voyage. In seeking payment for its services, Bernard certified to Taiwan that it had coordinated the movement of the cargo to the vessel and that it had prepared and processed the ocean bill of lading. Because it was engaged to perform these tasks and "was engaged to ensure that Ingersoll's cargo would be properly loaded on board the M/V Bodena so that proper bills of lading would be issued," (Pet. App. 17a), the courts below properly concluded that Bernard and Ingersoll had a maritime contract which supported admiralty jurisdiction.

Bernard wrongly asserts that there is a conflict with *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, *supra*. That case involved a general agency contract for husbanding services. Bernard's services were not part of a continuing or general agency relationship, were not similar to husbanding services, and did not "end when the freight is placed at the pier." *Id.*, 815 F.2d at 664. Its services for Ingersoll's cargo continued through and after the loading on board and the issuance of the loading on

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3 The District Court took note of cases in which this Court, *see Reid v. Fargo*, 241 U.S. 544, 545-46 (1916), and other federal courts "have traditionally exercised admiralty jurisdiction over shipper's claims against freight forwarders." (Pet. App. 53a). Congress, in regulating ocean freight forwarders, *see* 46 U.S.C. §§ 801, 841b(a); 46 C.F.R. Part. 510, has specifically found their services "'essential' for successful vessel operation." *See* 1961 U.S. Code Cong. & Ad. News, 2699, 2702, 2704. The Second Circuit took note of these cases but decided the case on the basis of the specific tasks performed by Bernard. (Pet. App. 14a).

board and the issuance of the proper written ocean contract of carriage and other shipping documents. These services were critical to the manner of, and contract by which this specific cargo would be shipped and its safe ocean journey would be assured.

There is also no conflict with the other decisions cited by Bernard. *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, *supra*, involved a routine husbanding contract. *See E.S. Binnings, Inc. v. M/V Saudi Riyadh*, *supra*, 815 F.2d at 664-65. In its decision below, the Second Circuit did not rely on *Hinkens Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411 (9th Cir. 1974), to expand or distinguish *Minturn*. It merely cited it for the proposition that the character of the work is controlling.

II. This Case Is Not An Appropriate One For The Review Of The Principles of Admiralty Jurisdiction, Because There Also Was Diversity and Pendant Party Jurisdiction.

Bernard's attempt to deny any federal jurisdiction is unavailing, because there was diversity and pendant party jurisdiction. Although the courts below did not reach these issues, the existence of these alternative grounds for decision, makes this an inappropriate case to reach the constitutional question of the scope of admiralty jurisdiction.

A. Diversity Jurisdiction.

There was diversity jurisdiction, because in July 1980, at the time the underlying action was filed, Ingersoll was an Illinois business, and Bernard was a New York corporation. Official records of the New York Secretary of State (included in Respondent's Appendix hereto, "Res. App. ___"), of which this Court may take notice, Rule 201(f), Fed. R. Evid.; *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977), show that on December 7, 1925, Bernard was incorporated in New York. (Res. App. 1a). On May 3, 1982, it changed its name to Radix Group International, Inc., and on June 16, 1982, a new

J.E. Bernard & Co., Inc. was incorporated in New York. (Res. App. 2a, 3a). In public filings with the SEC, its parent stated that on October 1, 1981, it acquired Bernard and that on May 1, 1982, Bernard was reorganized into Radix.

In its Petition *as originally filed* with this Court, Bernard asserted that there was no diversity because at the time the action was filed both Ingersoll and Bernard were "incorporated under the laws of the state of Illinois." (Pet. 8, n. 1). This statement was not correct. Counsel for Ingersoll then advised counsel for Bernard that on the basis of official state records of New York and Illinois, it did not appear that Bernard had ever been incorporated in Illinois. Bernard has since inserted a correction of this misstatement so that its Petition now reads:

> "At the time the underlying action was filed both Ingersoll and Bernard had their principal places of business in Illinois." (Pet. 8, n. 1).

This new representation is also incorrect.

Official records of the Illinois Secretary of State show that on February 1, 1977, in Bernard's first application for authority to transact business in Illinois, it stated under oath that it was incorporated in New York and that its principal place of business was in New York. (Res. App. 6a). Thus, at the time of the filing of the action,[4] Bernard was a New York corporation, 28 U.S.C. § 1332(c), and there clearly was diversity.[5]

---

4 In May, 1982, Radix amended Bernard's Illinois filing to note the name change to Radix, but it still stated that New York was the principal office designated in the charter, it listed New York as one of its principal offices, and it stated the principal officers were located in New York. (Res. App. 11a, 12a). On January 2, 1987, Bernard's authority to transact business in Illinois was revoked. (Res. App. 17a).

5 In 1980, when Ingersoll filed its complaint by its Illinois counsel, it believed that Bernard was incorporated in and had its principal place of business in Illinois and it so pleaded in the complaint. However, diversity was not then an issue. If Bernard had made jurisdiction an issue before post-trial briefs so that the District Court could have reviewed the matter, there would have been discovery, and the fact that Bernard is indisputably a New York corporation would have been disclosed.

B. Pendant Party Jurisdiction

This case also meets the requirements laid down by this Court for pendant party jurisdiction over a strictly state claim.

In *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725-26 (1966), this Court recognized the power of the federal courts to adjudicate a state claim in a federal question case when the relationship between the claims "permits the conclusion that the entire action before the Court comprises but one constitutional 'case,' " on a "common nucleus of operative fact." The exercise of this pendant jurisdiction is within the discretion of the court, giving due consideration to "judicial economy, convenience, and fairness to litigants." *Id.*, at 726.

Gibbs involved a single plaintiff and a single defendant, but the lower court trend has been in favor of recognizing the federal power to exercise pendant party jurisdiction over defendants named *only* with respect to state claims, provided that, as here, they arise from a common nucleus of operative facts with the federal claims against the other defendants. *See Moor v. County of Alameda*, 411 U.S. 693, 714-15 (1973); *Astor-Honor, Inc. v. Grosset & Dunlap, Inc.*, 441 F.2d 627, 629-30 (2d Cir. 1971); *Maltais v. United States*, 439 F. Supp. 540, 547-48 (N.D.N.Y. 1977); *Hipp v. United States*, 313 F. Supp. 1152, 1155 (E.D.N.Y. 1970).

In a case squarely on point, the Second Circuit has held that in an admiralty suit against a carrier for breach of the contract of carriage, the court may exercise pendant party jurisdiction over tort claims against a non-diverse terminal operator. *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809-11 (2d Cir. 1971).

This Court has not resolved the question of the scope of pendant party jurisdiction, but has applied a case by case analysis based on the context in which its application is sought. In *Moor v. County of Alameda*, *supra*, 411 U.S. at 713-15, the Court assumed, *arguendo*, the existence of pendant party jurisdiction, but upheld the lower court's application of its

discretion not to exercise it. In *Aldinger v. Howard*, 427 U.S. 1, 16-18 (1976), the Court affirmed the denial of pendant party jurisdiction in connection with 42 U.S.C. § 1983, but it did so because of specific Congressional action excluding certain parties from the scope of § 1983 cases. The Court took care to state that a different case was presented where the grant of federal jurisdiction is exclusive, because "the argument of judicial economy and convenience can be coupled with the additional argument that only in a federal Court may all of the claims be tried together." *Id.*, 427 U.S. at 18 (footnote omitted). *See also Owen Equipment and Erection Company v. Kroger*, 437 U.S. 365 (1978) (no pendant jurisdiction when federal jurisdiction is based only on diversity).

Subsequent to *Aldinger*, several courts have ruled that pendant party jurisdiction should be exercised where (1) the state and the federal claim arise from a common nucleus of operative facts; (2) Congress has not expressly or by implication negated the existence of jurisdiction; and (3) considerations of judicial economy, convenience, and fairness to litigants call for the exercise of jurisdiction, taking account of the exclusivity of federal jurisdiction and the ability to obtain full relief in one Court. *DeBellas v. United States*, 542 F. Supp. 999, 1004 (S.D.N.Y. 1982) (Federal Tort Claims Act case); *accord Morse Electro Products Corp. v. S.S. Great Pearce*, 437 F. Supp. 474, 479, 483-85 (D.N.J. 1977) (admiralty action citing the Second Circuit decision in *Leather's Best, Inc. v. S.S. Mormaclynx*, *supra*).

Here, where Ingersoll's claims against all other defendants are subject to the exclusive admiralty jurisdiction granted to the federal courts, 28 U.S.C. § 1333, and there is no contrary legislative or policy reason for not also hearing the claim against Bernard, Ingersoll's claim against Bernard satisfies the most stringent standards for exercising pendant jurisdiction. Ingersoll's claims against all defendants (and the third party claims among the defendants) are all derived from a common nucleus of operative facts. Efficiency, fairness, consistency of result and completeness of relief all argue for one federal

forum. *Lykins v. Pointer*, 725 F.2d 645, 647 (11th Cir. 1984); *Boudreaux v. Puckett*, 611 F.2d 1028, 1031 (5th Cir. 1980); *Ortiz v. United States*, 595 F.2d 65 (1st Cir. 1979).

Prior to its post-trial brief, Bernard raised no objection to the federal forum or to the transfer from Illinois. The conclusion is inescapable that Bernard never did so because it recognized that these claims arise in admiralty. With the case ready for decision after a long trial, it made no sense and would have been a great waste of judicial resources, for the District Court not to exercise pendant jurisdiction over Bernard.

Bernard's final contention that the exercise of pendant jurisdiction over Ingersoll's claim deprived it of a right to trial by jury is equally without merit. As the Second Circuit has held in the identical context, Bernard's failure to demand a trial by jury constituted a waiver of that right pursuant to Rule 38(d), Fed. R. Civ. P., and there is no obstacle to the exercise of pendant jurisdiction. *Leather's Best, Inc. v. S.S. Mormaclynx*, *supra*, 451 F.2d at 810-11, n.12; *see also Morse Electro Products Corp. v. S.S. Great Pearce*, *supra*, 437 F. Supp at 484. Furthermore, Bernard has nobody to blame but itself for its alleged loss of a jury trial. Had it given the District Court an early opportunity to address jurisdiction, it could have appealed to the Court's discretion under Fed. R. Civ. P. 39(b).

III. As A Matter Of Law And Of Fact, The Bill Of Lading Was Not Clean.

Bernard seeks a review of its liability for failure to secure clean bills of lading on the grounds that the courts below misinterpreted the meaning of "clean." Bernard does not explain why this is an important question of federal law for this Court to decide. It plainly is not. Furthermore, the Second Circuit's decision is consistent with numerous decisions of this Court and other circuits. The courts below did consider Bernard's evidence to support its contentions as to the meaning of a clean bill of lading and found that the record as a whole did not support Bernard's position.

The Second Circuit agreed with the District Court and held that the phrase a "clean bill of lading" is not limited to describing the condition of the goods, but "refers also to the place on a ship where cargo is to be stowed." (Pet. App. 18a). As the Second Circuit recognized (Pet. App. 19a), the cases and the commentators have long been in accord that a clean bill of lading imports stowage under desk. *The Delaware*, 81 U.S. (14 Wall) 579 (1874); *see St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial Do Rio De Janeiro*, 263 U.S. 119, 124 (1923); *The Idefjord*, 114 F.2d 262, 266 (2d Cir.), *cert. denied*, 311 U.S. 707 (1940); *Calmaquip Eng. West Hemisphere Corp. v. West Coast Carrier's Ltd.*, 650 F.2d 633, 639 (5th Cir. 1981).

Bernard seeks to avoid the force of one hundred years of case law and the views of most commentators by claiming that the courts below refused to consider its evidence of the parties' intent and the meaning of the term in the trade. This is untrue.

The District Court considered all of the evidence offered by both sides. Bernard's claims were refuted by the evidence. For example, Ingersoll's expert, an independent freight forwarder with forty years of experience, testified that the phrases "on deck" or "shipper's risk" made the bill of lading not clean because each limits the responsibility of the steamship line to the shipper. JA 1048-1 to 1049, 1061, 1069-6, 7; 1890. The *Merchant Marine Officer's Handbook*, pp. 18-26 (4th ed. 1965), in evidence (E 363), is to the same effect. For these reasons, Bernard plainly did not establish a custom in the industry to support its position.

The District Court properly held that Bernard's attempt to limit the meaning of clean was illogical:

> "The very purpose of clean on board bills of lading is to provide the shipper with documentation that the damage to his goods, if any occurs, cannot be attributed to him. In short, its purpose is to relieve the shipper of risk during the voyage. The bills of lading in this case maintain

> liability on Ingersoll throughout the voyage. Such bills cannot be clean."

(Pet. App. 50a). Whatever Bernard thought about the effect of "on deck," it had to know that the "shipper's risk notation rendered the bills of lading unclean." (Pet. App. 51a).[6]

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6 The INCO terms Bernard refers to were not part of *Bernard's* contract with Ingersoll. In any event, Bernard should have known what constitutes a clean bill of lading (Pet. App. 51a), and the INCO terms would not modify controlling precedents. (Pet. App. 18a, n.6). For the reasons stated by the District Court, a common sense analysis of the INCO definition shows it is consistent with those precedents. Even Bernard, which thought this cargo was covered by a bank letter of credit, JA 567, 575-76, knew that under Article 22a of INCO terms, the banks would not accept Ingersoll's bill of lading because it was marked "on deck."

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
December 31, 1987

JOHN DOAR
DOAR DEVORKIN & RIECK
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730

Attorney for Respondent
The Ingersoll Milling Machine Company

Of Counsel:

MICHAEL S. DEVORKIN
DOAR DEVORKIN & RIECK
233 Broadway, 10th Floor
New York, New York 10279
(212) 619-3730

APPENDIX

BEST AVAILABLE COPY

STATE OF NEW YORK,
DEPARTMENT OF STATE, ss:

I HEREBY CERTIFY, that I have made diligent examination of the index of corporation papers filed in this Department for a certificate, order or record of a dissolution of RADIX GROUP INTERNATIONAL, INC. the certificate of incorporation of which corporation was filed December 7, 1925, under the name of J. E. BERNARD & CO. INC., fixing the duration as perpetual.

I further certify that I find the following amendments:

Certificate of Designation
Filed January 8, 1935

Certificate of Amendment of
Certificate of Incorporation
Filed January 29, 1945

Certificate of Amendment of
Certificate of Incorporation
Filed November 23, 1976

Certificate of Change
Filed November 18, 1980

Certificate of Merger of
FREEDMAN & SLATER, INC.
FREEDMAN & SLATER AIR CARGO CORP. and
NEWCO INTERNATIONAL TRANSPORTATION, INC.
with
J. E. BERNARD & CO. INC.
Filed April 28, 1982

Certificate of Merger of
WOLF & GERBER, INC.
with
J. E. BERNARD & CO. INC.
Filed April 28, 1982

Certificate of Amendment of
J. E. BERNARD & CO. INC.
changing name to
RADIX GROUP INTERNATIONAL, INC.
Filed May 3, 1982

and that upon such examination, I find no such certificate, order or record, and that so far as indicated by the records of this Department, such corporation is a subsisting corporation.

WITNESS my hand and the official seal of the Department of State at the City of Albany, this 13th day of December one thousand nine hundred and eighty-five.

/s/ GAIL SHAFFER
Secretary of State

STATE OF NEW YORK,
DEPARTMENT OF STATE, ss:

I HEREBY CERTIFY, that I have made diligent examination of the index of corporation papers filed in this Department for a certificate, order or record of a dissolution of J. E. BERNARD & CO., INC., the certificate of incorporation of which corporation was filed June 16, 1982, with perpetual duration, and that upon such examination, I find no such certificate, order or record, and that so far as indicated by the records of this Department, such corporation is a subsisting corporation.

WITNESS my hand and the official seal of the Department of State at the City of Albany, this 13th day of December one thousand nine hundred and eighty-five.

/s/ GAIL SHAFFER
Secretary of State

File Number 5108-987-1

STATE OF ILLINOIS
OFFICE OF
THE SECRETARY OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I, JIM EDGAR, Secretary of State of the State of Illinois, do hereby certify that the following and hereto attached is a true copy of the Certificate of Authority and all Amendments thereto, to date, including the latest Change of Registered Agent or Registered Office of RADIX GROUP INTERNATIONAL, INC.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois this 23rd day of December A.D., 1987.

/s/ JIM EDGAR
Secretary of State

[SEAL]

Certificate Number 32387

STATE OF ILLINOIS
OFFICE OF
THE SECRETARY OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, J. E. BERNARD & CO. INC., incorporated under the laws of the State of New York has filed in the Office of the Secretary of State duly authenticated evidence of its incorporation and an application for Certificate of Authority to transact business in this State, as provided by "THE BUSINESS CORPORATION ACT" of Illinois, in force July 13, A.D., 1933.

NOW THEREFORE, I, ALAN J. DIXON, Secretary of State of the State of Illinois, by virtue of the powers and duties vested in me by law, do hereby issue this Certificate of Authority and attach thereto a copy of the application of the aforesaid corporation.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, done at the City of Springfield this 10th day of February A.D. 1977 and of the Independence of the United States the two hundred and 1st.

/s/ ALAN J. DIXON
Secretary of State

[SEAL]

Form BCA—106 or 114
(File in Duplicate)

Date Paid		*2-10-77*
License Fee	$	*50.00*
Franchise Tax	$	*141.67*
Filing Fee	$	*75.00*
Penalty	$	*26.94*
Clerk		*293.61*

APPLICATION FOR CERTIFICATE OF AUTHORITY
OF FOREIGN CORPORATION

566 25

February 1, 1977

To ALAN J. DIXON, Secretary of State, Springfield, Illinois:

J. E. BERNARD & CO. INC., a corporation organized and existing under and by virtue of the laws of the State of New York hereby makes application for a certificate of authority to transact business in the State of Illinois and submits the following application pursuant to "The Business Corporation Act," of Illinois:

First—The above corporation was duly incorporated under the laws of the State of New York on the 7th day of December, A.D. 1925, for a perpetual term.

Second—The location of the principal office as designated in the charter is New York, N.Y. The locations of its principal places of business are: 90 West Street, New York, N.Y. 10006.

Third—The address of the proposed registered office of the State of Illinois will be located at 39 S. La Salle Street in the city of Chicago 60603, County of Cook, and the name of its proposed registered agent in this State at such address is: GEORGE HUGH BARNARD.

Fourth—The corporation is transacting business and qualified under the foreign corporation laws of the following states and countries other than Illinois: New York

Fifth—The names of its officers and directors and their addresses are as follows:

Name	*City and State*	*Street and No.*
President, Irwin Wortman	New York, N.Y.	90 West Street
Secretary, George Hugh Barnard	Chicago, Ill.	39 S. La Salle St.
Director, Bruce A. Wilson	Elk Grove Village, Ill.	2150 Landmeier Rd.
Director, Edward L. Jordan	Elk Grove Village, Ill.	2150 Landmeier Rd.
Director, Morton John Barnard	Chicago, Ill.	39 S. La Salle St.
Director, George Hugh Barnard	Chicago, Ill.	39 S. La Salle St.

Sixth—The purpose or purposes for which it was organized which it proposes to pursue in the transaction of business in this State are:

Customs House Broker, Freight Forwarding, Transportation of Goods, Import and Export Trade (but not including operation of railroads).

Seventh—The number of shares which it has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, is:

Class	*Series (if any)*	*Number of Shares*	*Par value per share or statement that shares are without par value*
Common		1,000	Without par value

Eighth—The number of its issued shares, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, is:

Class	*Series (if any)*	*Number of Shares*	*Par value per share or statement that shares are without par value*
Common		100	Without par value

(NOTE: "Issued" shares, as used above, include (1) "outstanding" shares, and (2) all shares which have been issued and repurchased or redeemed by the corporation, but not cancelled of record in the home State.)

Ninth—The amount of stated capital and the amount of paid in surplus of the corporation as defined by "The Business Corporation Act" of Illinois, is:

The corporation elects to pay its license fees and franchise Tax on the basis of its total stated capital and paid-in-surplus

Stated Capital...$100,000.00

(Note: If no Paid in Surplus, insert "None") Paid in Surplus .$ NONE

Total.....$100,000.00

* * * * *

[Articles Tenth through Thirteenth omitted as they are blank on application]

Fourteenth—INTERROGATORIES:

* * * * *

[Interrogatories (a) through (f) omitted as they are blank on application]

(g) Is the corporation transacting business in this State at this time? *Yes*

(h) If your answer is in the affirmative, state the exact date on which it commenced to transact business in Illinois: *Feb. 1, 1977*

IN WITNESS WHEREOF, the undersigned corporation has caused this report to be executed in its name by its Vice President attested by its _____ Secretary, this 1st day of February, A.D. 1977.

J. E. BERNARD & CO., INC.
(Exact Corporate Title)

[SEAL]

By /s/ EDWARD L. JORDAN
Vice President

Attest:
/s/ GEORGE HUGH BARNARD
Secretary

STATE OF ILLINOIS,
COUNTY OF COOK, ss.

I, LUCILLE CAPRA, a Notary Public, do hereby certify that on the 1st day of February, A.D. 1977, personally appeared before me EDWARD L. JORDAN, who declares that he is Vice President of the corporation, executing the foregoing document, and being first duly sworn, acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

/s/ LUCILLE CAPRA
Notary Public

[SEAL]

[Filed February 10, 1987]

File Number 5108 987 1

STATE OF ILLINOIS
OFFICE OF
THE SECRETARY OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS, APPLICATION FOR AMENDED CERTIFICATE OF AUTHORITY TO TRANSACT BUSINESS IN THIS STATE, duly signed and verified of RADIX GROUP INTERNATIONAL, INC., incorporated under the laws of the State of New York has been filed in the office of the Secretary of State as provided by "The Business Corporation Act" of Illinois in force July 13, A.D., 1933.

NOW THEREFORE, I, JIM EDGAR, Secretary of State of the State of Illinois by virtue of the powers vested in me by law, do hereby issue this certificate and attach thereto a copy of the Application of the aforesaid corporation.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois, done at the City of Springfield this 18th day of May A.D. 1982 and of the Independence of the United States the two hundred and 6th.

/s/ JIM EDGAR
Secretary of State

[SEAL]

5108-987-1

Form BCA—106 or 114	Date Paid	*5-18-82*
(File in Duplicate)	License Fee	$
	Franchise Tax	$
	Filing Fee	$
	Penalty	$ *25.00*
	Clerk	*BV*

APPLICATION FOR AMENDED

_____, 19____

To ALAN J. DIXON, Secretary of State, Springfield, Illinois:

RADIX GROUP INTERNATIONAL, INC. (formerly J.E. Bernard & Co. Inc.), a corporation organized and existing under and by virtue of the laws of the State of New York hereby makes application for an amended certificate of authority to transact business in the State of Illinois and submits the following application pursuant to "The Business Corporation Act," of Illinois:

First—The above corporation was duly incorporated under the laws of the State of New York on the seventh day of December, A.D. 1925, for a Perpetual duration.

Second—The location of the principal office as designated in the charter is New York, N.Y. The locations of its principal places of business are: 152 William Street, New York, N.Y.; 1111 Nicholas Boulevard, Elk Grove, Illinois 60007.

Third—The address of the proposed registered office of the State of Illinois will be located at 39 South LaSalle Street in the city of Chicago (60606), County of Cook, and the name of its proposed registered agent in this State at such address is: George Hugh Barnard.

Fourth—The corporation is transacting business and qualified under the foreign corporation laws of the following states and countries other than Illinois:

Arizona, California, Florida

Fifth—The names of its officers and directors and their addresses are as follows:

Name	*Office*	*Address*	*Date of Taking Office*
Pierre L. Schoenheimer	Chairman	230 Park Avenue New York, N.Y.	April 15, 1982
John Radziwill	President & Director	156 William Street New York, N.Y.	April 15, 1982
Don S. Friedkin	Vice Pres., Sec'y & Director	230 Park Avenue New York, N.Y.	April 15, 1982
Matthew Sheppard	Vice Pres. & Treas.	156 William Street New York, N.Y.	April 15, 1982
Patrick H. Canary	Director	1111 Nicholas Blvd. Elk Grove, Illinois	April 15, 1982
Joseph Weinberg	Director	8728 Aviation Blvd. Inglewood, Cal. 90301	April 15, 1982

Sixth—The purpose or purposes for which it was organized which it proposes to pursue in the transaction of business in this State are:

Customs House Broker, Freight Forwarding, Transportation of Goods, and any other lawful purpose for which a corporation may be organized in the State of Illinois.

Seventh—The number of shares which it has authority to issue, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, is:

Class	*Series (if any)*	*Number of Shares*	*Par value per share or statement that shares are without par value*
common	N/A	1000	No par value

Eighth—The number of its issued shares, itemized by classes, par value of shares, shares without par value, and series, if any, within a class, is:

Class	*Series (if any)*	*Number of Shares*	*Par value per share or statement that shares are without par value*
common	N/A	100	No par value

(NOTE: "Issued" shares, as used above, include (1) "outstanding" shares, and (2) all shares which have been issued and repurchased or redeemed by the corporation, but not cancelled of record in the home State.)

Ninth—The amount of stated capital and the amount of paid in surplus of the corporation as defined by "The Business Corporation Act" of Illinois, is:

Stated Capital...$100,000

(Note: If no Paid in Surplus, insert "None") Paid in Surplus..$ none

Total.....$100,000

* * * * *

[Articles Tenth through Fourteenth omitted as they are blank on application]

IN WITNESS WHEREOF, the undersigned corporation has caused this report to be executed in its name by its Vice President attested by its _____ Secretary, this 1st day of May, A.D. 1982.

RADIX GROUP INTERNATIONAL, INC.
(Exact Corporate Title)

By /s/ M.P. SHEPPARD
Vice President

[SEAL]

Attest: /s/ [Illegible]
Secretary or Assistant Secretary

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.

I, PETER J. BERNBAUM, a Notary Public, do hereby certify that on the 1st day of May, A.D. 1982, personally appeared before me MATTHEW P. SHEPPARD, who declares that he is Vice President of the corporation, executing the foregoing document, and being first duly sworn, acknowledged that he signed the foregoing document in the capacity therein set forth and declared that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year before written.

/s/ PETER J. BERNBAUM
Notary Public

PETER JAY BERNBAUM
Notary Public, State of New York
No. 30-4618346
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1983

[SEAL]

[FILED MAY 18, 1982]

File #5108-987-1

BCA 5.10/5.20 (*Rev. Jul. 1984*)
Submit in Duplicate

Remit payment in Check or Money Order, payable to "Secretary of State".
DO NOT SEND CASH!

This Space For Use By Secretary of State

Date

Filing Fee $5.00

Clerk

Secretary of State
State of Illinois

STATEMENT OF CHANGE OF REGISTERED AGENT AND/OR REGISTERED OFFICE

Pursuant to the provisions of "The Business Corporation Act of 1983", the undersigned corporation hereby submits the following statement.

1. The name of the corporation is RADIX GROUP INTERNATIONAL, INC.
2. The State or Country of incorporation is New York
3. The name and address of its registered agent and its registered office as they appear on the records of the office of the Secretary of State (*Before Change*) are:

Registered Agent No Change
First Name *Middle Name* *Last Name*

Registered Office 222 West Adams Street
Number *Street* *Suite No. (A P.O. Box alone is not acceptable)*

Chicago 60606 Cook
City *Zip Code* *County*

4. The name and address of its registered agent and its registered office shall be (*After All Changes Herein Reported*):

Registered Agent The Prentice-Hall Corporation System, Inc.
First Name *Middle Name* *Last Name*

Registered Office 33 North LaSalle Street
Number *Street* *Suite No. (A P.O. Box alone is not acceptable)*

Chicago 60602 Cook
City *Zip Code* *County*

5. The address of the registered office and the address of the business office of the registered agent, as changed, will be identical.

6. The above change was authorized by: (*"X" one box only*)

a. ☐ By resolution duly adopted by the board of directors. *(Note 5)*

b. ☒ By action of the registered agent. *(Note 6)*

(If authorized by the board of directors, sign here. See Note 5)

* * * * *

The undersigned, under penalties of perjury, affirms that the facts stated herein are true.

The Prentice-Hall Corporation System, Inc.
By: /s/ STEPHEN W. CRAIG
(Signature of Registered Agent of Record)
Stephen W. Craig, Vice-President

Dated March 3, 1986

[FILED FEBRUARY 28, 1986 SECRETARY OF STATE]

File Number 5281-086-8

STATE OF ILLINOIS
OFFICE OF
THE SECRETARY OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I, JIM EDGAR, Secretary of State of the State of Illinois, do hereby certify that J. E. BERNARD & CO., INC., incorporated in the State of New York and licensed to transact business in this State August 9, 1982, corporation was Revoked by the Secretary of State on January 2, 1987, for failure to file an annual report and failure to pay franchise taxes, for the year 1986, thereby terminating their existence in the State of Illinois.

IN TESTIMONY WHEREOF, I hereto set my hand and cause to be affixed the Great Seal of the State of Illinois this 23rd day of December A.D., 1987.

/s/ JIM EDGAR
Secretary of State

[SEAL]

Supreme Court, U.S.
FILED
DEC 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

J.E. BERNARD & CO.,

Petitioner,

v.

THE INGERSOLL MILLING MACHINE COMPANY, M/V BODENA, her engines, boilers, etc., EXCELLENT MARINE, INC., TAIWAN INTERNATIONAL LINE LIMITED, and FIREMAN'S FUND INSURANCE CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT FIREMAN'S FUND INSURANCE CO.

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QUESTIONS PRESENTED

1. Whether this Court should review a decision wherein the Second Circuit Court of Appeals upheld admiralty jurisdiction over a freight forwarding contract involving an ocean shipment of goods and where petitioner has failed to show any conflict between the decision of the Second Circuit Court of Appeals and the decisions of this Court and of the other federal courts of appeals.
2. Whether it is necessary to decide the issue of admiralty jurisdiction over petitioner, J.E. Bernard, inasmuch as the District Court had pendent party jurisdiction over petitioner.
3. Whether this Court should review a decision of the Second Circuit Court of Appeals holding that an ocean bill of lading containing the phrase "ON DECK SHIPPER'S RISK" is not a clean bill of lading as a matter of law, wherein the Second Circuit's ruling is supported by precedent and where there is no conflict between this decision and those of other circuits or of this Court on this matter.

THE RULE 28.1 STATEMENT

Respondent Fireman's Fund Insurance Company was, at the time of the commencement of this litigation, a wholly owned subsidiary of American Express Corporation but became a publicly held corporation in October, 1985.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
RULE 28.1 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE WRIT:	
I.	
BERNARD HAS FAILED TO SHOW THAT THE SECOND CIRCUIT'S OPINION AFFIRMING ADMIRALTY JURISDICTION OVER THE CONTRACT BETWEEN BERNARD AND INGERSOLL CONFLICTS WITH ANY DECISION OF THIS COURT OR WITH THE DECISION OF ANY CIRCUIT COURT OF APPEALS	3
II.	
THE DISTRICT COURT HAD PENDENT JURISDICTION OVER BERNARD	8
III.	
THE DECISION OF THE SECOND CIRCUIT AFFIRMING THE DISTRICT COURT'S RULING THAT AN ON DECK BILL OF LADING IS NOT A CLEAN BILL OF LADING IS AMPLY SUPPORTED BY EXISTING PRECEDENT AND NEED NOT BE REVIEWED BY THIS COURT	9
CONCLUSION	11

TABLE OF AUTHORITIES

Cases Cited PAGE

The Cayo Mambi, 1 F.Supp. 116 (E.D.N.Y. 1932), *aff'd.*, 62 F.2d 791 (2d Cir. 1933) 6

The Delaware, 81 U.S. (14 Wall.) 579, 20 L.Ed. 779 (1871) 10

E.S. Binnings, Inc. v. M/V Saudi Riyadh, 815 F.2d 660 (11th Cir. 1987) 7

Ingersoll Mill Mach. Co. v. M/V Bodena, 619 F. Supp. 493 (D.C.N.Y. 1985) 1, 6

Ingersoll Mill Mach. Co. v. M/V Bodena, 829 F.2d 293 (2d Cir. 1987) 1, 6, 7, 9, 10

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971) 8

Minturn v. Maynard, 58 U.S. (17 How.) 477, 15 L.Ed. 235 (1855) 3

Peralta Shipping Corporation v. Smith & Johnson (Shipping) Corp., 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed. 2d 791 (1985) 3, 4, 5, 7

Reid v. Fargo, 241 U.S. 544, 36 S.Ct. 712, 60 L.Ed. 1156 (1916) 6

Seguros Banvenez S.A. v. S.S. Oliver Drescher, 761 F.2d 855 (2d Cir. 1985) 10

Thyssen, Inc. v. S.S. Fortune Star, 777 F.2d 57 (2d Cir. 1985) 10

United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966) 8

Rules Cited

Supreme Court Rule 17 ..... 3, 7

Rule 38 of the Federal Rules of Civil Procedure . 8

No. 87-897

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

J.E. BERNARD & CO.,

Petitioner,

v.

THE INGERSOLL MILLING MACHINE COMPANY, M/V BODENA, her engines, boilers, etc., EXCELLENT MARINE, INC., TAIWAN INTERNATIONAL LINE LIMITED, and FIREMAN'S FUND INSURANCE CO.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT FIREMAN'S FUND INSURANCE CO.

STATEMENT OF THE CASE

Respondent Fireman's Fund Insurance Company makes the following additions to the statement of the case contained in Bernard's petition. First, Bernard was retained to secure clean on board bills of lading for Ingersoll. Both the District Court and the Second Circuit Court of Appeals found that Bernard breached that primary duty. *Ingersoll Mill Mach. Co. v. M/V Bodena*, 829 F.2d 293, 303 (2d Cir. 1987) (A 17a-18a).[1] Second, Bernard's main obligations were not shoreside in Illinois. Rather, Bernard's undertaking to secure clean on board bills of lading included the obligation to monitor the loading process in New Orleans to ensure that the proper bills would be issued. *Ingersoll, supra* at 305 (A 21a).

Third, as noted in the District Court opinion, Bernard raised the issue that the District Court lacked subject matter jurisdiction for the first time in its post-trial brief in chief. *Ingersoll Mill Mach. Co. v. M/V Bodena*, 619 F.Supp. 493, 502 (D.C.N.Y. 1985) (A 53a). Finally, the Second Circuit Court of Appeals affirmed Fireman's Fund's right of subrogation against Bernard and Taiwan for all amounts paid to Ingersoll with the exception of attorneys' fees and litigation expenses. *Ingersoll Mill Mach. Co. v. M/V Bodena*, 829 F.2d 293, 308-09 (2d Cir. 1987) (A 20a-30a).

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[1] Appendix page references are made to the appendix contained in Bernard's petition.

SUMMARY OF ARGUMENT

Bernard fails to establish any reason which would compel this Court to grant a writ of certiorari. Bernard's assertion that the decision of the Second Circuit Court of Appeals conflicts with decisions of this Court and of other federal courts of appeals is contrived. Close examination of this assertion reveals that no such conflict exists. Bernard's contract is not a *Minturn*-type contract and Bernard fails to identify any authority holding that a freight forwarder of ocean cargo is encompassed within the *Minturn* exception to admiralty jurisdiction.

Moreover, a review of admiralty jurisdiction over Bernard is unnecessary as the District Court had pendent jurisdiction over Bernard.

Finally, Bernard fails to provide any support for its argument that the Second Circuit erred in defining the term "clean bill of lading". This term is well-defined under existing case law and authority which fully support the Second Circuit's decision.

REASONS FOR DENYING THE WRIT

I.

BERNARD HAS FAILED TO SHOW THAT THE SECOND CIRCUIT'S OPINION AFFIRMING ADMIRALTY JURISDICTION OVER THE CONTRACT BETWEEN BERNARD AND INGERSOLL CONFLICTS WITH ANY DECISION OF THIS COURT OR WITH THE DECISIONS OF ANY CIRCUIT COURT OF APPEALS.

Supreme Court Rule 17 sets forth guiding criteria for the exercise of this Court's discretion in granting review upon a writ of certiorari. One of the foremost reasons supporting the exercise of this Court's discretion to grant review is the existence of a conflict between the circuits on the same matter of law. It is, therefore, not surprising that the primary reason advanced by Bernard as to why this Court should grant this writ is what it claims to be a conflict between the opinion of the Second Circuit Court of Appeals and "decisions of this Court and other circuits." (Bernard petition at p. 5). An examination of the cases relied upon by Bernard, however, illustrates that no such conflict exists. Accordingly, Bernard's argument of an alleged conflict to persuade this Court to exercise its discretion and grant review should be rejected.

Bernard's primary assertion is that the Second Circuit's decision "conflicts with the long standing rule that general agency contracts are not cognizable in admiralty. *Minturn v. Maynard*, 58 U.S. (17 How.) 477, 15 L.Ed. 235 (1855)." (Bernard petition at p. 5). From the outset, Bernard has misstated the rule established by the *Minturn* decision. That rule, as stated recently by Justice Blackmun in his dissenting opinion in the denial of the writ of certiorari in *Peralta Shipping Corporation v. Smith & Johnson (Ship-*

ping) Corp., 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985), is specific and limited to agency contracts involving the husbanding of vessels.

> The admiralty jurisdiction of the federal courts extends generally to a transaction that " 'relates to ships and vessels, masters and mariners, as the agents of commerce.' " *Kossick v. United Fruit Co.*, 365 U.S. 731, 736, 81 S.Ct. 886, 890, 6 L.Ed.2d 56 (1961), quoting one E. Benedict, Admiralty 131. Notwithstanding the broad sweep of the admiralty jurisdiction, this Court, since the time of its single-page opinion in *Minturn v. Maynard*, 17 How. 477, 15 L.Ed. 235 (1855), has refused to extend admiralty jurisdiction to disputes involving general agency contracts that call for "husbanding" a vessel, that is, arranging for the performance of the various services that are preliminary to maritime movement. 105 S.Ct. at 1405.

Bernard refers to this same citation for defining the *Minturn* rule (p. 5 of its petition), but uses an ellipsis after the words "general agency contracts" in order to delete the phrase "that call for 'husbanding' a vessel". This deletion presents a distorted and inaccurate view of the very narrow scope of *Minturn*.

The Second Circuit Court of Appeals' opinion upholding admiralty jurisdiction over J.E. Bernard is not in conflict with *Minturn*, as Bernard's contract with Ingersoll is not a general agency contract involving the "husbanding" of a vessel. In fact, Bernard's contract is not anything like the ship's agent contract involved in *Minturn*, where the agent for the shipowner had advanced monies for supplies and repairs to the vessel. Bernard has never claimed to be a "husbanding" agent of the vessel. Bernard is a freight forwarder who had contracted with a shipper, Ingersoll, to undertake certain tasks including the procurement of a clean on board ocean bill of lading. As will be discussed

below, both the District Court and the Second Circuit Court of Appeals closely examined Bernard's contractual duties and found them to have sufficient maritime relationship to invoke admiralty jurisdiction.

Bernard has characterized its contract with Ingersoll as a *Minturn*-type contract in an attempt to capitalize on and expand the debate surrounding the continued vitality of the *Minturn* rule. Bernard cites to Justice Blackmun's opinion dissenting from the denial of certiorari in the *Peralta* case (p. 7 of its petition) for the proposition that confusion over the *Minturn* rule is a reason why this Court should grant certiorari. This is a peculiar argument as Justice Blackmun's comments in *Peralta* call for the elimination of the *Minturn* exception to admiralty jurisdiction, while Bernard advocates the expansion of that exception. Justice Blackmun, taking note of the mounting criticism of the *Minturn* rule, stated that "*Minturn* has been criticized widely and severely because it excludes so much that obviously concerns maritime transactions." *Peralta Shipping, supra* at 1406. Bernard's inferences notwithstanding, Justice Blackmun clearly does not share Bernard's view that *Minturn* should be expanded.

Moreover, whether there exists a conflict between the circuits regarding the continued vitality of the *Minturn* rule is wholly irrelevant to Bernard's petition. The District Court and the Second Circuit Court of Appeals have both held that Bernard's contract is not the type of contract addressed by *Minturn*. The District Court and the Second Circuit Court of Appeals have both examined Bernard's contract in detail and have ruled that, as a freight forwarder, its contractual duties were sufficiently maritime in nature to invoke federal admiralty jurisdiction. This is a crucial finding of the courts below and Bernard offers no authority that that finding is in conflict with the decisions of this Court or of other federal courts of appeals.

Judge Carter in the District Court opinion pointed out that federal courts have traditionally exercised admiralty jurisdiction over shippers claims against freight forwarders, citing *Reid v. Fargo*, 241 U.S. 544, 545-46, 36 S.Ct. 712, 713, 60 L.Ed. 1156 (1916), *The Cayo Mambi*, 1 F.Supp. 116, 117 (E.D.N.Y. 1932), *aff'd.*, 62 F.2d 791 (2d Cir. 1933), and others. *Ingersoll Milling Machine Company v. M/V Bodena*, 619 F.Supp. 493 (D.C.N.Y. 1985) at 503. The District Court found that the "[p]reparation and processing the bill of lading, the export declarations and payment of the ocean freight 'were clearly maritime and necessary' for the shipment by ocean voyage to Korea". 619 F.Supp. at 503. (A 54a).

The Second Circuit Court of Appeals specifically discussed this point in affirming jurisdiction against Bernard. It stated:

> While we decline to lay down a general rule that freight forwarders are always subject to admiralty jurisdiction, we do hold, for reasons discussed below, that in this instance, Bernard's freight forwarding contract with Ingersoll involved enough tasks of a non-preliminary nature to support admiralty jurisdiction.
>
> * * *
>
> Specifically, we note that the district court found that Bernard's obligation with regard to the bills of lading was twofold. First, Bernard was engaged to secure clean on board bills of lading. Additionally, on receipt of the bills of lading, Bernard was to review the copies it received and to advise Ingersoll if in fact they were not clean. 619 F.Supp. at 502. Bernard's duty to secure clean bills of lading is akin to the issuance of bills of lading themselves. An obligation to procure a bill of lading for an ocean shipment, in our view, is a contract relating to transportation by sea. The procurement of the proper papers and documents

> relating to a shipment by sea is an essential and integral part of the shipping process; a contract to obtain those papers, therefore, falls squarely within the admiralty jurisdiction of the federal courts. *Ingersoll Milling Machine Company v. M/V Bodena*, 829 F.2d 293 (2d Cir. 1987) at 301-03.

Bernard suggests that the Second Circuit's decision below is in conflict with the Eleventh Circuit's decision in *E.S. Binnings, Inc. v. M/V Suadi Riyadh*, 815 F.2d 660 (11th Cir. 1987), and with the Second Circuit's own opinion in *Peralta Shipping Corporation v. Smith & Johnson (Shipping) Corp.*, 739 U.S. 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031, 105 S.Ct. 1405, 84 L.Ed.2d 791 (1985). Once again, it is clear upon a reading of both cases that the contracts in question in those cases involved vessel husbanding services so as to fall neatly within the ambit of the *Minturn* rule. As Bernard does not assert that its contract with Ingersoll involved, in any way, vessel husbanding, it is impossible to see how the case at bar is in conflict with these decisions. Stripped of these alleged conflicts, Bernard presents to this Court in its petition for certiorari nothing more than a prayer for this Court to enlarge upon the *Minturn* exception to admiralty jurisdiction. This, it might be pointed out, is an opportunity that this Court has already declined in *Peralta*, where, unlike here, a true *Minturn*-type contract was involved.

There are no conflicts as described in Rule 17(a) and the issue presented by Bernard's petition, whether this Court should expand the *Minturn* exception to admiralty jurisdiction, is not an important question of federal law so as to merit review under Rule 17(c). As pointed out above, the ground swell is for the elimination of the jurisdictional exception, not for its expansion. Accordingly, we urge this Court to deny Bernard's petition for writ of certiorari.

II.

THE DISTRICT COURT HAD PENDENT JURISDICTION OVER BERNARD.

An alternative basis of federal jurisdiction, pendent party jurisdiction, existed for Ingersoll's claims against Bernard. As there was a common nucleus of operative facts between Ingersoll's claim against Bernard and its admiralty claims against the vessel owner and charterer, the District Court had the power to hear the whole case. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L. Ed.2d 218 (1966). *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809-11 (2d Cir. 1971).

Having found independent admiralty jurisdiction over Ingersoll's contract with Bernard, neither the District Court nor the Second Circuit Court of Appeals found it necessary to address the issue of pendent jurisdiction. Bernard's only discussion of this issue is in a footnote. (Bernard petition at pp. 7-8, fn. 1).

Bernard claims that the exercise of pendent jurisdiction would deny its right to a jury trial. Bernard, however, admits that it did not even file a jury demand. (Bernard petition at p. 8, fn. 1). Bernard asserts, without benefit of authority, that it should be excused from filing a jury demand as it relied upon Rule 38(e) of the Federal Rules of Civil Procedure. Bernard is mistaken. The failure to file a jury demand is a waiver under Rule 38(d) of the Federal Rules of Civil Procedure, even when a party is contesting admiralty jurisdiction. *Leather's Best, Inc. supra*, at 811, fn. 12 provides:

> [I]nsofar as third-party practice has relevance to the question of pendent jurisdiction in this case, we are not faced with any problem of denial of the right to jury trial since Tidewater made no such demand below. See F.R.Civ. P. 38(d).

It is clear that Ingersoll's claim against Bernard is pendent to Ingersoll's admiralty claims against other defendants. It is equally clear that the exercise of pendent jurisdiction over Bernard would not serve to deprive Bernard of a trial by jury, as Bernard waived that right by electing to not file a jury demand. Under these circumstances, this Court can conclude that the District Court, in the absence of admiralty jurisdiction, would have exercised pendent party jurisdiction over Bernard. The recognition of pendent jurisdiction would render further review of admiralty jurisdiction over Bernard unnecessary.

III.

THE DECISION OF THE SECOND CIRCUIT AFFIRMING THE DISTRICT COURT'S RULING THAT AN ON DECK BILL OF LADING IS NOT A CLEAN BILL OF LADING IS AMPLY SUPPORTED BY EXISTING PRECEDENT AND NEED NOT BE REVIEWED BY THIS COURT.

The second and final reason advanced by Bernard for the granting of a writ of certiorari is that the Second Circuit Court of Appeals erroneously defined "clean bill of lading" and that this term is an important and undecided question of federal law. What Bernard fails to acknowledge is that the Second Circuit Court of Appeals relied upon extensive precedent directly on point in affirming the District Court on this issue. Moreover, Bernard has failed to produce any case authority which would support Bernard's position that an on deck bill of lading can still be a clean bill of lading.

The Second Circuit Court of Appeals' opinion contains a specific section entitled " 'Clean' on Board Bills of Lading". *Ingersoll, supra* 829 F.2d at 303-304 (A 18a-20a). Authority in support of the finding that an on deck bill of lading is not a clean bill of lading includes *The*

Delaware, 81 U.S. (14 Wall.) 579, 602, 20 L.Ed. 779 (1871), *Seguros Banvenez S.A. v. S.S. Oliver Drescher*, 761 F.2d 855, 859 (2d Cir. 1985), and *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 59 (2d Cir. 1985).

Bernard does not cite to any contrary authority and does not allege any conflict in decisions of other federal courts of appeals on this issue. Rather, Bernard makes an unsupported allegation at page 10 of its petition that the Second Circuit refused to consider evidence of the parties' and the trade's customary use of the term. Not only is this allegation unsupported, it is in error. Footnote six of the Second Circuit's opinion makes a specific reference to trade custom and usage. "The meaning of a 'clean' bill of lading is one firmly established by the custom and practice of the maritime industry." *Ingersoll, supra* at 304 fn. 6.

Bernard urges that the Second Circuit should have looked to "Incoterms" as reflective of the parties' usage and asserts that the "Incoterms were incorporated into the contract in this case". (Bernard petition at p. 10). This allegation is unsupported and inappropriate as there is no evidence in the record that Incoterms were part of any contract to which Bernard was a party.

In sum, Bernard has failed to show that the term "clean bill of lading" is not sufficiently defined under existing case law and has further failed to raise any legitimate reason which would compel this Court to review this issue.

CONCLUSION

For all of the reasons stated above, this Court should deny J.E. Bernard's petition for a writ of certiorari.

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Respondents.

REPLY BRIEF OF J.E. BERNARD & CO. IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO THE PETITION 1

INTRODUCTION 1

ARGUMENT 3

I. THERE WAS NO ALTERNATIVE BASIS FOR THE DISTRICT COURT TO EXERCISE JURISDICTION IN THIS CASE 3

A. Ingersoll's Complaint Failed To Allege Facts To Support A Finding Of Jurisdiction Based Upon Diversity Of Citizenship 3

B. This Case Is Not A Proper One For The Exercise Of Pendent Party Jurisdiction Since The Court Had No Independent Basis For Federal Jurisdiction Over Bernard 4

II. THE *MINTURN* RULE HAS BEEN APPLIED TO GENERAL AGENCY AGREEMENTS SUCH AS THE ONE HERE 6

CONCLUSION 7

APPENDIX 1a

Complaint of The Ingersoll Milling Machine Co. . 1a

Answer of J.E. Bernard & Co. 8a

TABLE OF AUTHORITIES

CASES: *Page*

Aldinger v. Howard, 427 U.S. 1 (1976) 4, 5

Continental Cameras Co., Inc. v. FOA & Son Corp., 658 F. Supp. 287 (S.D.N.Y. 1987), *aff'd*, 831 F.2d 45 (2d Cir. 1987) 6

Continental Cameras Co., Inc. v. FOA & Son Corp., 831 F.2d 45 (2d Cir. 1987) 2, 6

E.S. Binnings, Inc. v. M/V Saudi Riyadh, 815 F.2d 660 (11th Cir. 1987) 6

Gold Washing & Water Co. v. Keyes, 96 U.S. 199 (1878) 3

Harvey v. Hamilton, 155 Ill. 377 (1895) 5

Hinkins Steamship Agency, Inc. v. Freighters, Inc., 498 F.2d 411 (9th Cir. 1974) 6

Laughlin v. Hopkinson, 292 Ill. 80 (1920) 5

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800 (2d Cir. 1971) 4, 5

Minturn v. Maynard, 58 U.S. (17 How.) 477 (1855) 2, 6, 7

Morse Electro Products Corp. v. S.S. Great Peace, 437 F. Supp. 474 (D.N.J. 1977) 3

Musico v. Champion Credit Corp., 764 F.2d 102 (2d Cir. 1985) 3

Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp., 470 U.S. 1031 (1985) 2, 7

CASES: *Page*

Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp., 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985) 7

T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks, Inc., 702 F.2d 585 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983) 6

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) . . . 4

Williams v. Shipping Corp. of India, Ltd., 354 F. Supp. 626 (S.D. Ga. 1973) 6

STATUTES:

28 U.S.C. § 1332(a) 3

28 U.S.C. § 1332(c) 3

28 U.S.C. § 1333(1) 5

ILL. REV. STAT. ch. 17 § 6402 5

MISCELLANEOUS:

J. Moore, *5 Moore's Federal Practice* ¶ 38.39 [1] (2d ed. 1987) 6

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REPLY BRIEF OF J.E. BERNARD & CO. IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INTRODUCTION

The Petitioner J.E. Bernard & Co. respectfully prays that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on September 14, 1987, and October 23, 1987. The Second

Circuit, *inter alia*, rejected Bernard's challenge to admiralty jurisdiction. Although no alternative bases for jurisdiction were raised below, Respondents now suggest that this Court reject Bernard's challenge to admiralty jurisdiction because, they argue, both diversity and pendent party jurisdiction exist. Contrary to Respondents' arguments, however, the pleadings demonstrate that the parties were not diverse. Moreover, to invoke pendent party jurisdiction at this late date would have the severe penalty of denying Bernard the right to a jury trial and of assessing Bernard with prejudgment interest.

Respondents further claim that *Minturn* does not apply to this case and thus there is no conflict among the circuits. To the contrary, had *Minturn* been properly followed in this case, the Second Circuit would have found Ingersoll's claim against Bernard to be outside the scope of admiralty jurisdiction. Instead the court below merely added to the conflict among the circuits. This conflict was recognized by Justice Blackmun in his dissent in *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031, (1985) (Blackmun, J., dissenting). In addition, the Second Circuit has again contributed to the conflict with its recent decision in *Continental Cameras, Inc. v. FOA & Son Corp.*, 831 F.2d 45 (2d Cir. 1987). Accordingly, the question presented by Bernard's petition, whether a dispute involving documentation services performed under an agency agreement and ancillary to a maritime contract falls outside the scope of admiralty jurisdiction, is ripe for review.

ARGUMENT

I.

THERE WAS NO ALTERNATIVE BASIS FOR THE DISTRICT COURT'S EXERCISE OF JURISDICTION IN THIS CASE.

A. Ingersoll's Complaint Failed To Allege Facts To Support A Finding Of Jurisdiction Based Upon Diversity Of Citizenship.

Section 1332(a) of Title 28 of the United States Code grants district courts original jurisdiction in civil actions in which the amount in controversy exceeds $10,000 and the parties are citizens of different states. For diversity purposes, a corporation has dual citizenship; it is deemed a citizen of the state where it is incorporated and of the state where it has its principal place of business. 28 U.S.C. § 1332(c). The grounds for diversity jurisdiction must be stated on the face of the complaint. *Gold Washing & Water Co. v. Keyes*, 96 U.S. 199 (1878).

Ingersoll filed its complaint on July 14, 1980, alleging that both Ingersoll and Bernard were incorporated under the laws of the state of Illinois and that both Ingersoll and Bernard had their principal places of business in Illinois. *See* appendix to reply at 1a, *infra*. Bernard's answer, filed on August 26, 1980, admitted that Bernard indeed had its principal place of business in Illinois, but denied being incorporated under the laws of the state of Illinois. *See* appendix to reply at 8a, *infra*. Since both Ingersoll and Bernard had their principal places of business in Illinois, diversity was not complete. The pleadings themselves establish that the parties were not diverse.

Not only is Ingersoll's discussion of contrary facts dehors the record, but Ingersoll waived its right to challenge these jurisdictional facts by failing to do so below. *Musico v. Champion Credit Corp.*, 764 F. 2d 102, 108 (2d Cir. 1985). *See also Morse Electro Products Corp. v. S.S. Great Peace*, 437 F. Supp 474, 481 n. 9 (D.N.J. 1977);

Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809 n. 10 (2d Cir. 1971). Even if Ingersoll could properly challenge these facts now, however, it fails to support its assertion that Bernard did not have its principal place of business in Illinois when this suit was filed. In its 1980 answer to Ingersoll's complaint, Bernard admitted that its principal place of business was in Elk Grove Village, Illinois. Moreover, as reflected in Bernard's amended application for authority to conduct business in Illinois, filed in 1982, Bernard's indicated that it considered Elk Grove Village, Illinois to be a principal place of business at that time. *See* appendix to Ingersoll's Response at 11a. Bernard's 1977 application for authority to transact business in Illinois simply does not demonstrate the facts as they existed in 1980, when this suit was filed. The facts in 1980 were as they were pleaded by Ingersoll; that both Ingersoll and Bernard had their principal places of business in Illinois in 1980. Accordingly, Ingersoll's complaint failed to allege facts to support its belated claim that the parties were diverse.

B. This Case Is Not A Proper One For The Exercise Of Pendent Party Jurisdiction Since The Court Had No Independent Basis For Federal Jurisdiction Over Bernard.

"[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right . . . ." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). In determining whether to exercise pendent jurisdiction, a court must consider judicial economy, convenience and fairness to the litigants. *Id.* It is unfair to a litigant to bring a purely state claim within the federal courts' jurisdiction when there exists, as here, no independent basis for federal jurisdiction over the party. *See Aldinger v. Howard*, 427 U.S. 1, 14 (1976); *Leather's Best, Inc.*, 451 F.2d at 811. In *Aldinger*, this Court affirmed the appellate court's refusal to:

> permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to join an entirely different defendant on the basis of a state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant "derive[d] from a common nucleus of operative fact."

427 U.S. at 14.[1] Here, Ingersoll has no federal claims against Bernard and the parties are not diverse. Moreover, the liability of the parties named in the federal claims did not turn upon the conduct of Bernard. Requiring Ingersoll's state claim against Bernard to be tried with the federal claims solely through the exercise of pendent party jurisdiction would clearly be unfair to Bernard.

To determine, at this late stage, that pendent party jurisdiction existed below would similarly prejudice Bernard. Had Bernard's contract liability been pled by Ingersoll as a purely state claim, joined in a federal action through the exercise of pendent jurisdiction, Illinois law would have applied to the claim. Bernard would then have been entitled to a jury trial and, under Illinois law, would not have been liable for prejudgment interest. ILL. REV. STAT. ch. 17 § 6402. *See Harvey v. Hamilton*, 155 Ill. 377 (1895); *Laughlin v. Hopkinson*, 292 Ill. 80 (1920). Since this state claim was erroneously pleaded and embraced by admiralty jurisdiction, however, prejudgment interest was assessed against Bernard and, more importantly, Bernard was denied its right to a jury trial.

Ingersoll relies on *dicta* in *Leather's Best* to support its assertion that Bernard waived its right to a jury trial by failing to make a demand below. One cannot waive

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[1] This Court has yet to determine whether pendent party jurisdiction may even be employed with respect to a claim brought under 28 U.S.C. § 1333(1) to confer jurisdiction over a purely state claim.

that which was never ripe. Rule 38(b) provides for a jury demand only when such a right exists. *See* J. Moore, *5 Moore's Federal Practice* ¶ 38.39 [1] (2d ed. 1987). Regardless of whether Bernard had demanded a jury, therefore, its demand would have been stricken. *See Williams v. Shipping Corp. of India, Ltd.*, 354 F. Supp 626, 629-30 (S.D. Ga. 1973); *T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks*, 702 F.2d 585, 587 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983). Due to the significant implications of exercising pendent party jurisdiction, clearly this Court must find that the time for determining whether to exercise such jurisdiction has passed.

II

THE *MINTURN* RULE HAS BEEN APPLIED TO GENERAL AGENCY AGREEMENTS SUCH AS THE ONE HERE.

Contrary to Fireman Fund's assertion, the rule set forth in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), that general agency contracts do not fall within the scope of admiralty jurisdiction, has been applied to agency contracts other than those for husbanding services. For example, in its recent decision in *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660 (11th Cir. 1987), the Eleventh Circuit distinguished the agency contract in that case from one that was solely for husbanding services. The court stated that, unlike the purely husbanding contract in *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411 (9th Cir. 1974), which was found to be within the scope of admiralty jurisdiction, the agency contract in *Binnings* also called for the performance of documentation, cargo solicitation and accounting services. This general agency non-husbanding contract was therefore found to be outside the scope of admiralty jurisdiction. In *Continental Cameras Co., Inc v. FOA & Son Corp.*, 658 F. Supp. 287 (S.D.N.Y. 1987), the district court held that an agency agreement to procure a marine insurance contract did not

fall within admiralty jurisdiction. Although the district court did not specifically cite *Minturn*, the Second Circuit, in affirming, cited *Peralta (Shipping) Corp. v. Smith & Johnson Shipping Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985), which relied solely on the *Minturn* rule in its analysis. *Continental Cameras Co., Inc. v. FOA & Son Corp.*, 831 F.2d 45 (2d Cir. 1987). These two cases, in addition to the language in the Second Circuit's opinion in the instant case, clearly demonstrate that the *Minturn* rule has been applied to general agents other than agents for husbanding services.

CONCLUSION

In *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031 (1985), Justice Blackmun recognized the conflict among the circuits over the application of the *Minturn* rule governing admiralty jurisdiction over general agents. This case contributes to the conflict and is a worthy subject for Supreme Court review. For this reason, as well as the other reasons stated in Bernard's petition for certiorari, Bernard respectfully requests that its petition be granted.

Respectfully submitted,

Of Counsel:

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Counsel for Petitioner

APPENDIX

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

THE INGERSOLL MILLING MACHINE COMPANY,
Plaintiff,

v.

J. E. BERNARD & CO., TAIWAN INTERNATIONAL LINE, LTD., and FIREMAN'S FUND INSURANCE CO.,
Defendants.

NO.

COMPLAINT

Plaintiff, The Ingersoll Milling Machine Company ("Ingersoll") complains against defendants, J. E. Bernard & Co. ("Bernard"), Taiwan International Line, Ltd. ("Taiwan Line") and Fireman's Fund Insurance Co. ("Fireman's fund") and alleges:

Parties and Jurisdiction

1. Plaintiff, Ingersoll, is a corporation incorporated under the law of the State of Illinois. It has its principal place of business in Rockford, Illinois and is in the business of making and selling machinery.

2. Defendant, Bernard, is a corporation incorporated under the laws of the State of Illinois. It has its principal place of business in Elk Grove Village, Illinois and is in the business of freight forwarding.

3. Defendant, Taiwan Line, is a corporation incorporated under the laws of the Republic of Taiwan. Taiwan Line owns and operates a number of vessels engaged in carrying cargo as a common carrier on the high seas, including

the M/V Bodena, which at all times hereinafter mentioned was a general ship engaged in the common carriage of merchandise for hire between, among others, the ports of New Orleans and Pusan, Korea.

4. Defendant, Fireman's Fund, is a corporation incorporated under the laws of the State of California. It has its principal place of business in San Francisco, California and is in the business of marine insurance.

5. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1333.

6. This is a case of cargo damage, civil and maritime, and is an admiralty and maritime claim within the meaning of Rule 9(h).

COUNT I

Plaintiff, Ingersoll, complains against defendant, Bernard, and alleges:

7-10. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 2, 5 and 6.

11. On or about July, 1979 Ingersoll entered into an agreement with Bernard pursuant to which Bernard was to act as the freight forwarder and arrange for safe shipment of horizontal spindle machinery from Rockford, Illinois to plaintiff's consignee in Korea.

12. The machinery packed in twenty boxes marked S.O. 24441 (the "machinery") left Ingersoll's factory in Rockford, Illinois in good order and condition approximately between August 29 and September 19, 1979.

13. The machinery arrived sometime thereafter in New Orleans in the same good order and condition and was placed in possession of Bernard, or its duly authorized agent.

14. Bernard had the duty to arrange for the safe loading and stowage of the machinery aboard the Bodena for its safe arrival in good condition in Pusan, Korea.

15. On or about September 27, 1979, the twenty boxes of machinery, in the same good order and condition, were loaded on board the Bodena and, without the authority or acquiescence of Ingersoll, were stowed "on deck" of the Bodena.

16. The Bodena sailed from New Orleans on September 27, 1979 to the destination port of Pusan, Korea.

17. Upon arrival in Pusan, Korea, on or about November 28, 1979, when the twenty boxes were discharged from the Bodena, it was found that the boxes were not in the same good order and condition as when delivered on board the Bodena and a great part of their contents had heavy rust, corrosion and other damage from exposure to the elements.

18. Bernard failed to perform its duties to prevent damage to the machinery and to ensure arrival of the machinery in good condition in Pusan by wrongfully permitting "on deck" stowage of the cargo.

19. Ingersoll has duly performed all valid conditions precedent to recovery on its part to be performed.

WHEREFORE, Ingersoll demands judgment against Bernard in the sum of $2,500,000, as well as interest and the costs of this litigation.

COUNT II

Plaintiff, Ingersoll, complains against defendant, Taiwan Line, and alleges:

20-26. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 3, 5, 6, 12, 13 and 15.

27. Taiwan Line received the machinery from Bernard on September 27, 1979.

28. On or about September 27, 1979, defendant received at the port of New Orleans, the 20 boxes of

machinery in good order and condition, to be carried from the port of New Orleans to the port of Pusan, Korea, there to be delivered in like good order and condition as when shipped, in consideration of an agreed freight.

29. Taiwan Line had the duty to ensure that the machinery be safely stowed and carried aboard the Bodena and to prevent damage to the cargo.

30. Plaintiff's cargo could only be carried safely "below deck". However, Taiwan Line breached its duty to ensure safe and appropriate stowage of the cargo, and without plaintiff's acquiescence or consent, wrongfully loaded, stowed and carried the cargo "on deck" aboard the M/V Bodena as evidenced by Bill of Lading No. 1, New Orleans/Pusan.

31. Ingersoll had no notice of the "on deck" stowage until receipt of a copy of the Bill of Lading prepared by Bernard and issued by the defendant, Taiwan Line after the vessel Bodena was well at sea.

32. Thereafter the vessel, having the machinery on board, sailed from the port of New Orleans and subsequently arrived at the port of Pusan, Korea where the Bodena discharged the machinery, not in like good order and condition as when delivered to the vessel and to the defendant at the port of New Orleans, but seriously injured and damaged by heavy rust, corrosion and other damage from exposure to the elements.

33. By reason of the premises the plaintiff has sustained damages in the sum of $2,500,000 as nearly as the same can now be estimated, no part of which has been paid although the same has been duly demanded.

34. Ingersoll has duly performed all valid conditions precedent to recovery on its part to be performed.

WHEREFORE, Ingersoll demands judgment against Taiwan Line, in the sum of $2,500,000 as well as interest and the costs of this litigation.

COUNT III

Plaintiff, Ingersoll, complains against defendant, Taiwan Line, and alleges:

35-40. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 3, 5, 6, 13 and 15.

41. Thereafter the defendant loaded the machinery on board the Bodena at New Orleans, and the vessel, having the machinery on board, sailed from the port of New Orleans for Pusan, Korea, the contractual port of discharge of the cargo. During the course of the boyage [sic], however, on the orders of the defendant, the vessel improperly and unjustifiably deviated from her proper course to the port of Pusan and put in at certain ports located on the east coast of the United States and other ports. During the course of such unjustifiable deviation, the machinery referred to in the complaint was damaged.

42. The plaintiffs repeat and reallege each and every allegation contained in paragraphs 33 and 34 of the first cause of action.

WHEREFORE, Ingersoll demands judgment against Taiwan Line, in the sum of $2,500,000 as well as interest and the costs of this litigation.

COUNT IV

Plaintiff, Ingersoll, complains against defendant, Fireman's Fund, and alleges:

43-51. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 4, 5, 6, 11, 12, 15, 16 and 17.

52. On or about August 20, 1979, by a marine certificate No. 442423, dated the same date, in in consideration of the agreed premium which has been duly paid by the plaintiff, the defendant insured the plaintiff herein, on twenty boxes of machinery in the sum of $2,108,000, which sum was agreed value of the merchandise to be shipped on board

the Bodena at and from New Orleans to Pusan, Korea. The insurance attached from the time the goods insured left the factory of the plaintiff and covered thereafter while at risk of the assured, in due course of shipment, until delivered at store or warehouse of the consignee at destination. A copy of the marine certificate No. 422423 is hereto annexed and made a part of this complaint and marked Exhibit "A".

53. On or about September 27, 1979, the twenty boxes of machinery were duly laden on board the vessel Bodena and that ship proceeded on her voyage from the port of New Orleans to the port of Pusan, Korea. When the twenty boxes were discharged from the vessel Bodena, it was found that the cases and crates were not in the same good order and condition as when delivered to the steamship but were in a severely rusted and corroded condition, and a great part of their contents were damaged.

54. The plaintiff duly filed claim with defendant for the value of the machinery damaged during the voyage but the defendant declined the claim and has since refused to pay the same or any part thereof.

55. At the time of the commencement of this risk and thereafter until the loss, the plaintiff was the owner of the insured cargo and has suffered damages in the sum of $2,500,000, as nearly as can be ascertained at this time.

56. The plaintiff has complied with and duly performed all the conditions of the marine certificate on its part to be performed, and duly advised the duly authorized agents of the insurers of the loss promptly.

57. No part of the sum of $2,500,000 has been paid, although duly demanded by the plaintiff, and by reason of the premises such sum is now due and owing from the defendant to the plaintiff with interest thereon from November 28, 1979.

WHEREFORE, Ingersoll demands judgment against Fireman's Fund in the sum of $2,500,000 as well as interest and costs of this litigation.

THE INGERSOLL MILLING MACHINE COMPANY

By: /s/ JOSEPH KEIG, JR.
Joseph Keig, Jr.
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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE INGERSOLL MILLING MACHINE COMPANY,
Plaintiff,

vs.

J. E. BERNARD & CO., TAIWAN INTERNATIONAL LINE, LTD., and FIREMAN'S FUND INSURANCE CO.,
Defendants.

No. 80 C 3576

ANSWER TO COMPLAINT

J.E. BERNARD & CO. ("Bernard") answers plaintiff's Complaint as follows:

1. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1.

2. It denies the allegations of the first sentence of paragraph 2. It admits that its principal place of business is in Elk Grove Village, Illinois. It admits that at some times it has performed in the business of freight forwarding. It denies the remaining allegations of paragraph 2.

3. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3.

4. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4.

5. It admits that paragraph 5 purports to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1333, but denies

the remaining allegations of paragraph 5.

6. It admits that paragraph 6 purports to classify this as an admiralty and maritime claim within the meaning of Rule 9 (h), but denies the remaining allegations of paragraph 6.

COUNT I

7-10. It repeats and realleges each and every answer contained in paragraphs 1, 2, 5 and 6 as though fully set forth herein.

11. It denies the allegations of paragraph 11.

12. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12.

13. It denies the allegations of paragraph 13.

14. It denies the allegations of paragraph 14.

15. It denies the allegations of paragraph 15.

16. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16.

17. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17.

18. It denies the allegations of paragraph 18.

19. It denies the allegations of paragraph 19.

WHEREFORE, Defendant, J.E. BERNARD & COMPANY, denies that plaintiff, THE INGERSOLL MILLING MACHINE COMPANY, is entitled to judgment in any amount whatsoever.

that which was never ripe. Rule 38(b) provides for a jury demand only when such a right exists. *See* J. Moore, *5 Moore's Federal Practice* ¶ 38.39 [1] (2d ed. 1987). Regardless of whether Bernard had demanded a jury, therefore, its demand would have been stricken. *See Williams v. Shipping Corp. of India, Ltd.*, 354 F. Supp 626, 629-30 (S.D. Ga. 1973); *T.N.T. Marine Service, Inc. v. Weaver Shipyards & Dry Docks*, 702 F.2d 585, 587 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983). Due to the significant implications of exercising pendent party jurisdiction, clearly this Court must find that the time for determining whether to exercise such jurisdiction has passed.

II

THE *MINTURN* RULE HAS BEEN APPLIED TO GENERAL AGENCY AGREEMENTS SUCH AS THE ONE HERE.

Contrary to Fireman Fund's assertion, the rule set forth in *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1855), that general agency contracts do not fall within the scope of admiralty jurisdiction, has been applied to agency contracts other than those for husbanding services. For example, in its recent decision in *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660 (11th Cir. 1987), the Eleventh Circuit distinguished the agency contract in that case from one that was solely for husbanding services. The court stated that, unlike the purely husbanding contract in *Hinkins Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411 (9th Cir. 1974), which was found to be within the scope of admiralty jurisdiction, the agency contract in *Binnings* also called for the performance of documentation, cargo solicitation and accounting services. This general agency non-husbanding contract was therefore found to be outside the scope of admiralty jurisdiction. In *Continental Cameras Co., Inc v. FOA & Son Corp.*, 658 F. Supp. 287 (S.D.N.Y. 1987), the district court held that an agency agreement to procure a marine insurance contract did not

fall within admiralty jurisdiction. Although the district court did not specifically cite *Minturn*, the Second Circuit, in affirming, cited *Peralta (Shipping) Corp. v. Smith & Johnson Shipping Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985), which relied solely on the *Minturn* rule in its analysis. *Continental Cameras Co., Inc. v. FOA & Son Corp.*, 831 F.2d 45 (2d Cir. 1987). These two cases, in addition to the language in the Second Circuit's opinion in the instant case, clearly demonstrate that the *Minturn* rule has been applied to general agents other than agents for husbanding services.

CONCLUSION

In *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031 (1985), Justice Blackmun recognized the conflict among the circuits over the application of the *Minturn* rule governing admiralty jurisdiction over general agents. This case contributes to the conflict and is a worthy subject for Supreme Court review. For this reason, as well as the other reasons stated in Bernard's petition for certiorari, Bernard respectfully requests that its petition be granted.

Respectfully submitted,

Of Counsel:

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APPENDIX

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

THE INGERSOLL MILLING MACHINE COMPANY,
Plaintiff,

v.

J. E. BERNARD & CO., TAIWAN INTERNATIONAL LINE, LTD., and FIREMAN'S FUND INSURANCE CO.,
Defendants.

NO.

COMPLAINT

Plaintiff, The Ingersoll Milling Machine Company ("Ingersoll") complains against defendants, J. E. Bernard & Co. ("Bernard"), Taiwan International Line, Ltd. ("Taiwan Line") and Fireman's Fund Insurance Co. ("Fireman's fund") and alleges:

Parties and Jurisdiction

1. Plaintiff, Ingersoll, is a corporation incorporated under the law of the State of Illinois. It has its principal place of business in Rockford, Illinois and is in the business of making and selling machinery.

2. Defendant, Bernard, is a corporation incorporated under the laws of the State of Illinois. It has its principal place of business in Elk Grove Village, Illinois and is in the business of freight forwarding.

3. Defendant, Taiwan Line, is a corporation incorporated under the laws of the Republic of Taiwan. Taiwan Line owns and operates a number of vessels engaged in carrying cargo as a common carrier on the high seas, including

the M/V Bodena, which at all times hereinafter mentioned was a general ship engaged in the common carriage of merchandise for hire between, among others, the ports of New Orleans and Pusan, Korea.

4. Defendant, Fireman's Fund, is a corporation incorporated under the laws of the State of California. It has its principal place of business in San Francisco, California and is in the business of marine insurance.

5. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1333.

6. This is a case of cargo damage, civil and maritime, and is an admiralty and maritime claim within the meaning of Rule 9(h).

COUNT I

Plaintiff, Ingersoll, complains against defendant, Bernard, and alleges:

7-10. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 2, 5 and 6.

11. On or about July, 1979 Ingersoll entered into an agreement with Bernard pursuant to which Bernard was to act as the freight forwarder and arrange for safe shipment of horizontal spindle machinery from Rockford, Illinois to plaintiff's consignee in Korea.

12. The machinery packed in twenty boxes marked S.O. 24441 (the "machinery") left Ingersoll's factory in Rockford, Illinois in good order and condition approximately between August 29 and September 19, 1979.

13. The machinery arrived sometime thereafter in New Orleans in the same good order and condition and was placed in possession of Bernard, or its duly authorized agent.

14. Bernard had the duty to arrange for the safe loading and stowage of the machinery aboard the Bodena for its safe arrival in good condition in Pusan, Korea.

15. On or about September 27, 1979, the twenty boxes of machinery, in the same good order and condition, were loaded on board the Bodena and, without the authority or acquiescence of Ingersoll, were stowed "on deck" of the Bodena.

16. The Bodena sailed from New Orleans on September 27, 1979 to the destination port of Pusan, Korea.

17. Upon arrival in Pusan, Korea, on or about November 28, 1979, when the twenty boxes were discharged from the Bodena, it was found that the boxes were not in the same good order and condition as when delivered on board the Bodena and a great part of their contents had heavy rust, corrosion and other damage from exposure to the elements.

18. Bernard failed to perform its duties to prevent damage to the machinery and to ensure arrival of the machinery in good condition in Pusan by wrongfully permitting "on deck" stowage of the cargo.

19. Ingersoll has duly performed all valid conditions precedent to recovery on its part to be performed.

WHEREFORE, Ingersoll demands judgment against Bernard in the sum of $2,500,000, as well as interest and the costs of this litigation.

COUNT II

Plaintiff, Ingersoll, complains against defendant, Taiwan Line, and alleges:

20-26. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 3, 5, 6, 12, 13 and 15.

27. Taiwan Line received the machinery from Bernard on September 27, 1979.

28. On or about September 27, 1979, defendant received at the port of New Orleans, the 20 boxes of

machinery in good order and condition, to be carried from the port of New Orleans to the port of Pusan, Korea, there to be delivered in like good order and condition as when shipped, in consideration of an agreed freight.

29. Taiwan Line had the duty to ensure that the machinery be safely stowed and carried aboard the Bodena and to prevent damage to the cargo.

30. Plaintiff's cargo could only be carried safely "below deck". However, Taiwan Line breached its duty to ensure safe and appropriate stowage of the cargo, and without plaintiff's acquiescence or consent, wrongfully loaded, stowed and carried the cargo "on deck" aboard the M/V Bodena as evidenced by Bill of Lading No. 1, New Orleans/Pusan.

31. Ingersoll had no notice of the "on deck" stowage until receipt of a copy of the Bill of Lading prepared by Bernard and issued by the defendant, Taiwan Line after the vessel Bodena was well at sea.

32. Thereafter the vessel, having the machinery on board, sailed from the port of New Orleans and subsequently arrived at the port of Pusan, Korea where the Bodena discharged the machinery, not in like good order and condition as when delivered to the vessel and to the defendant at the port of New Orleans, but seriously injured and damaged by heavy rust, corrosion and other damage from exposure to the elements.

33. By reason of the premises the plaintiff has sustained damages in the sum of $2,500,000 as nearly as the same can now be estimated, no part of which has been paid although the same has been duly demanded.

34. Ingersoll has duly performed all valid conditions precedent to recovery on its part to be performed.

WHEREFORE, Ingersoll demands judgment against Taiwan Line, in the sum of $2,500,000 as well as interest and the costs of this litigation.

COUNT III

Plaintiff, Ingersoll, complains against defendant, Taiwan Line, and alleges:

35-40. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 3, 5, 6, 13 and 15.

41. Thereafter the defendant loaded the machinery on board the Bodena at New Orleans, and the vessel, having the machinery on board, sailed from the port of New Orleans for Pusan, Korea, the contractual port of discharge of the cargo. During the course of the boyage [sic], however, on the orders of the defendant, the vessel improperly and unjustifiably deviated from her proper course to the port of Pusan and put in at certain ports located on the east coast of the United States and other ports. During the course of such unjustifiable deviation, the machinery referred to in the complaint was damaged.

42. The plaintiffs repeat and reallege each and every allegation contained in paragraphs 33 and 34 of the first cause of action.

WHEREFORE, Ingersoll demands judgment against Taiwan Line, in the sum of $2,500,000 as well as interest and the costs of this litigation.

COUNT IV

Plaintiff, Ingersoll, complains against defendant, Fireman's Fund, and alleges:

43-51. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1, 4, 5, 6, 11, 12, 15, 16 and 17.

52. On or about August 20, 1979, by a marine certificate No. 442423, dated the same date, in in consideration of the agreed premium which has been duly paid by the plaintiff, the defendant insured the plaintiff herein, on twenty boxes of machinery in the sum of $2,108,000, which sum was agreed value of the merchandise to be shipped on board

the Bodena at and from New Orleans to Pusan, Korea. The insurance attached from the time the goods insured left the factory of the plaintiff and covered thereafter while at risk of the assured, in due course of shipment, until delivered at store or warehouse of the consignee at destination. A copy of the marine certificate No. 422423 is hereto annexed and made a part of this complaint and marked Exhibit "A".

53. On or about September 27, 1979, the twenty boxes of machinery were duly laden on board the vessel Bodena and that ship proceeded on her voyage from the port of New Orleans to the port of Pusan, Korea. When the twenty boxes were discharged from the vessel Bodena, it was found that the cases and crates were not in the same good order and condition as when delivered to the steamship but were in a severely rusted and corroded condition, and a great part of their contents were damaged.

54. The plaintiff duly filed claim with defendant for the value of the machinery damaged during the voyage but the defendant declined the claim and has since refused to pay the same or any part thereof.

55. At the time of the commencement of this risk and thereafter until the loss, the plaintiff was the owner of the insured cargo and has suffered damages in the sum of $2,500,000, as nearly as can be ascertained at this time.

56. The plaintiff has complied with and duly performed all the conditions of the marine certificate on its part to be performed, and duly advised the duly authorized agents of the insurers of the loss promptly.

57. No part of the sum of $2,500,000 has been paid, although duly demanded by the plaintiff, and by reason of the premises such sum is now due and owing from the defendant to the plaintiff with interest thereon from November 28, 1979.

WHEREFORE, Ingersoll demands judgment against Fireman's Fund in the sum of $2,500,000 as well as interest and costs of this litigation.

THE INGERSOLL MILLING MACHINE COMPANY

By: /s/ JOSEPH KEIG, JR.
Joseph Keig, Jr.
One of the Attorneys for Plaintiff

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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE INGERSOLL MILLING MACHINE COMPANY,
Plaintiff,

vs.

J. E. BERNARD & CO., TAIWAN INTERNATIONAL LINE, LTD., and FIREMAN'S FUND INSURANCE CO.,
Defendants.

No. 80 C 3576

ANSWER TO COMPLAINT

J.E. BERNARD & CO. ("Bernard") answers plaintiff's Complaint as follows:

1. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 1.

2. It denies the allegations of the first sentence of paragraph 2. It admits that its principal place of business is in Elk Grove Village, Illinois. It admits that at some times it has performed in the business of freight forwarding. It denies the remaining allegations of paragraph 2.

3. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 3.

4. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4.

5. It admits that paragraph 5 purports to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1333, but denies

the remaining allegations of paragraph 5.

6. It admits that paragraph 6 purports to classify this as an admiralty and maritime claim within the meaning of Rule 9 (h), but denies the remaining allegations of paragraph 6.

COUNT I

7-10. It repeats and realleges each and every answer contained in paragraphs 1, 2, 5 and 6 as though fully set forth herein.

11. It denies the allegations of paragraph 11.

12. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 12.

13. It denies the allegations of paragraph 13.

14. It denies the allegations of paragraph 14.

15. It denies the allegations of paragraph 15.

16. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 16.

17. It is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 17.

18. It denies the allegations of paragraph 18.

19. It denies the allegations of paragraph 19.

WHEREFORE, Defendant, J.E. BERNARD & COMPANY, denies that plaintiff, THE INGERSOLL MILLING MACHINE COMPANY, is entitled to judgment in any amount whatsoever.

BEST AVAILABLE COPY

COUNTS II, III and IV

Counts II, III and IV are not directed against this defendant.

/s/ H. RODERIC HEARD

One of the Attorneys for Defendant
J. E. BERNARD & CO.

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